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Supreme Court of the United States

October Term, 1915

No. 889

BANKERS TRUST COMPANY, as Trustee,

Appellant,

v.

THE TEXAS AND PACIFIC RAILWAY COMPANY and NEW ORLEANS PACIFIC RAILWAY COMPANY

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION

BRIEF FOR APPELLANT

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Supreme Court of the United States

OCTOBER TERM, 1915

BANKERS TRUST COMPANY, as Trustee, v. THE TEXAS AND PACIFIC RAILWAY COMPANY et al.	Term No. 889

BRIEF FOR APPELLANT

Statement of Case

This is a suit for foreclosure of a railroad second mortgage securing income bonds, because of default in the payment of interest, and for an accounting, and for an injunction restraining the diversion to other uses of income applicable to the payment of interest, and for a receivership.

All citations to the transcript refer to the top paging of the printed transcript, to which are added where indicated references to folios and marginal paging. All italics are ours.

The amount in controversy is alleged (Tr. 45, fol. 150) to exceed the sum of $5,000, exclusive of interest and costs, and in fact it is several millions of dollars.

It is alleged (Tr., 1-2, fol. 3) that the plaintiff is a corporation of the state of New York, and (Tr. 2, fol. 6) that the defendant New Orleans Pacific Railway Company is a corporation of the state of Louisiana. As to the defendant The Texas and Pacific Railway Company, called also the Texas company, it is alleged (Tr., 2, fol. 5,) that it is "a corporation duly created by and existing under the laws of the United States of America, and has its principal place of business and its principal operating and general offices in the city of Dallas in the state of Texas, in the Dallas division of the northern district of Texas, and that a material and substantial part of the railroads owned and operated by it as hereinafter described, to wit, over four hundred miles thereof, are located in said northern district of Texas, and the defendant Texas company is a resident and inhabitant of the said Dallas division of said northern district of Texas." The mortgage in suit, a copy of which is made an exhibit to the bill, recites (Tr., 50) that said company is "a corporation created by and existing under the laws of the United States of America, and of the states of Louisiana and Texas."

The defendant The Texas and Pacific Railway Company was incorporated by the act of Congress of March 3, 1871 (16 Stat. at L. 573), which act was supplemented by the act of May 2, 1872 (17 Stat. at L. 59), and by the act of March 3, 1873 (17 Stat. at L. 598), and by the act of June 22, 1874, (18 Stat. at L. 197). These four acts contain many and detailed provisions regarding the power of the company to borrow money and to mortgage its property as security therefor. The existence of these acts is pleaded, and the provisions thereof relevant to the company's power to mortgage its property are set forth at length

in the bill (Tr., 2-7, fols. 7-21). The terms of the bonds and mortgage also are pleaded, and a copy of the mortgage is made an exhibit to the bill (Tr., 12-30, 49-87). In section 1 of the act of March 3, 1871, it is provided that the company "shall be able to sue and be sued, plead and be impleaded, defend and be defended, in all courts of law and equity within the United States". The provisions of these various acts will be set forth more fully in connection with the discussion of the second and third specifications of error.

The plaintiff claimed in the district court, and claims here, that the district court has jurisdiction of this cause (1) by reason of the express grant of jurisdiction contained in section 1 of the act of March 3, 1871, (2) because of the existence of a federal question, and (3) on account of diversity of citizenship.

The defendant New Orleans Pacific Railway Company filed a motion to dismiss as to it upon the ground that it was not suable in the northern district of Texas, it being an inhabitant of the eastern district of Louisiana (Tr., 97-98; marg. pp. 101-103). The court denied this motion (Tr., 138, marg. p. 161), and of this ruling the plaintiff of course does not complain.

The court dismissed the bill as to both defendants on motion of the defendant The Texas and Pacific Railway Company, and upon the sole ground that it was without jurisdiction to entertain the same (Tr., 98-100, 138-139; marg. pp. 104-106, 161), holding that its jurisdiction of the cause by reason of the express grant of jurisdiction in the charter and because of the existence of a federal question had been taken away by section 5 of the act of January 28, 1915 (38 Stat. at L. 803), and holding that the bill did not show jurisdiction

on account of diversity of citizenship (Tr., 139-142; marg. pp. 162-166).

This appeal is prosecuted for the sole purpose of reviewing the ruling of the district court that it was without jurisdiction of the cause, which ruling presents the only question involved in the order of dismissal (Tr., 138-144; marg. pp. 161, 162-166, 167, 168, and 169-170).

Specifications of Error

1

The court erred in holding that it was without jurisdiction to hear and determine said cause, and in dismissing the amended bill of complaint therein because of such supposed want of jurisdiction.

2

The court erred in holding that there did not remain to it after the taking effect of the act of congress of January 28, 1915, jurisdiction to hear and determine said cause by reason of the express grant of such jurisdiction in the act of congress of March 3, 1871.

3

The court erred in holding that there did not remain to it after the taking effect of the act of congress of January 28, 1915, jurisdiction to hear and determine said cause as a suit of a civil nature, in equity, where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of three thousand dollars, and arises under the constitution or laws of the United States.

The court erred in holding that it had not jurisdiction to hear and determine said cause as a suit of a civil nature, in equity, where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of three thousand dollars, and is between citizens of different states.

Brief of the Argument

JURISDICTION BY VIRTUE OF GRANT THEREOF IN CHARTER

SPECIFICATIONS OF ERROR

1. The court erred in holding that it was without jurisdiction to hear and determine said cause, and in dismissing the amended bill of complaint therein because of such supposed want of jurisdiction.

2. The court erred in holding that there did not remain to it after the taking effect of the act of congress of January 28, 1915, jurisdiction to hear and determine said cause by reason of the express grant of such jurisdiction in the act of congress of March 3, 1871.

First Proposition

Jurisdiction to hear and determine such suits as this against The Texas and Pacific Railway Company was expressly vested in the appropriate federal courts by the act of congress incorporating said company.

Authorities

Act of March 3, 1871, ch. 122, § 1, 16 Stat. at L. 573; Act of May 2, 1872, ch. 132, § 1, 17 Stat. at L. 59; Smith v. Union Pacific R. Co., 2 Dillon 278, 22 Fed. Cas. 694; Bauman v. Union Pacific R. Co., 3 Dillon 367, 2 Fed. Cas. 1,043; Pacific Railroad Removal Cases, 115 U. S. 1 (24); Matter of Dunn, 212 U. S. 374 (384); Osborn v. Bank of the United States, 9 Wheaton 738; Magill v. Parsons, 4 Conn. 317-336.

Argument

It was decided in 1820-1822 by Justices Todd and Washington on circuit, and by the supreme court of Connecticut (Magill v. Parsons, 4 Conn. 317-336), and in 1824 it was definitively settled by the classic reasoning of Chief Justice Marshall in Osborn v. Bank of the United States, 9 Wheaton 738, that under the constitution congress has the power to confer upon the federal courts jurisdiction of suits by or against corporations created by act of congress. Therefore the only question open to debate in this connection is whether congress has expressly conferred upon the appropriate federal courts jurisdiction of such a suit as this against The Texas and Pacific Railway Company, or, to state the question conversely, whether congress has expressly subjected The Texas and Pacific Railway Company to the jurisdiction of the appropriate federal courts with reference to such a suit as this against it.

By the act of March 3, 1871 (16 Stat. at L. 573), congress incorporated Texas Pacific Railroad Company, and by section 1 of that act provided that such corporation should "be able to sue and be sued, plead and be impleaded, defend and be defended, in all courts of law and equity within the United States." The act of May 2, 1872 (17 Stat. at L. 59), was denominated by its title an act supplementary to the act of March 3, 1871. By section 1 of said act congress provided that the name of Texas Pacific Railroad Company thereafter should be The Texas and Pacific Railway Company, and that said The Texas and Pacific Railway Company should have, possess, and enjoy all the rights, privileges, and franchises theretofore conferred upon the said Texas Pacific Railroad Company. The question is whether the language above quoted from section 1 of the act of March 3, 1871, imported a grant to the appropriate federal courts of jurisdiction of suits by or against the company.

Certainly if this language be construed in accordance with its literal meaning it must be held to have conferred such jurisdiction. In 1871 the circuit and district courts were courts of law and equity within the United States, and now the district court is a court of law and equity within the United States possessing most of the original jurisdiction then vested in the two courts. The case at bar is a suit whose amount and character are such as to bring it within the jurisdiction of a United States district court, sitting as a court of equity. Therefore, unless this statute is to be construed as meaning something different from and less than its literal signification, the present suit is one whereof jurisdiction was conferred upon the

district court by the act of March 3, 1871, and the act of 1911 transferring to the district court the jurisdiction formerly appertaining to the circuit court.

Doubtless it will be contended that the language quoted means nothing more than to say that the company may sue and be sued in any court having jurisdiction of the persons and the cause of action. The power to sue and the liability to be sued in any court having jurisdiction of the persons and the cause of action are inherent in every corporation. The mere fact of corporate existence implies such a power and such a liability. It is contrary to elementary rules of interpretation needlessly to say that congress did not mean to accomplish anything by the use of this language, or that it meant that the statute including this language should signify precisely what it would signify without it.

When the Union Pacific Railroad Company was chartered in 1862, the country through which it was to run was peopled mainly by Indians and pioneers, and social and legal conditions were crude. When The Texas and Pacific Railway Company was chartered in 1871, the greater part of the country through which it was to pass was in the hands of Indians, Mexicans and pioneers. As to the remainder, the prevailing conditions were even worse, for those were the days of reconstruction, when carpetbagger and Ku Klux clansman were struggling for control. Congress incorporated these companies, and aided them in the construction of their roads, for the accomplishment of great public ends. It may well have thought that the federal courts were likely to be of higher character than those organized locally in such circum-

stances. And it may well have deemed it safer that these corporations which it was creating and endowing for public service, should be subject to the jurisdiction of the federal courts, and have the right of access to the federal courts.

The charter of the first Bank of the United States (1 Stat. at L. 191) provided in section 3 that the bank should be able "to sue and be sued, plead and be impleaded, answer and be answered, defend and be defended, in courts of record, or any other place whatsoever." And in paragraph 9 of section 7 it provided that the directors of the bank should be individually liable for its debts in excess of certain limits, and that for the recovery thereof creditors of the bank might sue them or any of them "in any court of record of the United States, or of either of them." In 1808 the bank instituted in the circuit court for the district of Georgia an action to recover money which had been taken from it for taxes by state officials. The circuit court held that it had no jurisdiction. Upon appeal to this Court in 1809 counsel so eminent as Horace Binney argued (1) that congress had under the constitution power to authorize the bank to sue in the circuit court, and (2) that by the clause above quoted from section 3 of the charter congress had done this. This Court, speaking through Chief Justice Marshall, held that the language quoted from section 3 merely gave to the corporation the capacity to appear "in any court which would, by law, have cognizance of the cause, if brought by individuals." As conclusive evidence of the correctness of this interpretation of the clause and the error of the interpretation urged by Mr. Binney, the chief justice referred to the clause above quoted from paragraph 9 of section

7, and said: "That section * * * expressly authorizes the bringing of that action in the federal or state courts." Bank of the United States v. Deveaux, 5 Cranch 61 (71 and 85-6).

The charter of the second Bank of the United States (3 Stat. at L. 266) provided in section 7 that the bank should be able "to sue and be sued, plead and be impleaded, answer and be answered, defend and be defended, in all state courts having competent jurisdiction, and in any circuit court of the United States." In Osborn v. Bank of the United States, 9 Wheaton 738 (816), this Court, speaking again through Chief Justice Marshall, held that this language, unlike that in section 3 of the charter of the first Bank of the United States, conferred, in words which admitted of only one interpretation and could not be made plainer by explanation, the right to sue and be sued in every circuit court of the United States.

The words used in the charter of the defendant company, authorizing it to sue and be sued "in all courts of law and equity within the United States." do not so plainly confer jurisdiction upon the federal courts as those used in the charter of the second Bank of the United States, or so plainly omit to confer such jurisdiction as did those found in section 3 of the charter of the first Bank of the United States. They seem to us more nearly analogous to the words found in paragraph 9 of section 7 of the charter of the first Bank of the United States, which Chief Justice Marshall said expressly authorized suit in the federal or state courts.

The words of the charter of The Texas and Pacific Railway Company now under discussion are the same as those used by congress nine years before in incorporating The Union Pacific Railroad

Company (12 Stat. at L. 489), which company was empowered by section 1 of its charter "to sue and to be sued, plead and be impleaded, defend and be defended, in all courts of law and equity within the United States."

In 1872 a citizen of Ohio sued The Union Pacific Railroad Company in the circuit court for Nebraska to recover damages for injuries received in the course of his employment as a brakeman for the defendant company. The company demurred to the complaint upon the ground that the court was without jurisdiction to hear it. Mr. Justice Miller, presiding, took the question under advisement and later handed down this short opinion.

> "The act of congress creating the defendant corporation (12 Stat. 490) contains this provision: 'The Union Pacific Railroad Company' by 'that name shall have perpetual succession, and shall be able to sue and to be sued, plead and be impleaded, defend and be defended, in all courts of law and equity within the United States, and may make and have a common seal,' etc., (section 1). I have examined the previous decisions of the Supreme Court of the United States supposed to have an important bearing on the question now presented, and, after reflection, am still of opinion that congress intended to make the defendant capable of suing and being sued in the federal courts which have jurisdiction of the same class of actions between other parties. Demurrer overruled." Smith v. Union Pac. R. Co., 2 Dillon 278, 22 Fed. Cas. 694.

The reporter's note indicates that Mr. Justice Miller, in speaking of the previous decisions which he had examined, was referring to the Deveaux case in 5th Cranch, the Osborn case in 9th Wheaton and the Martin case in 5th Peters.

Three years later, in 1875, a citizen of Nebraska sued The Union Pacific Railroad Company in the circuit court for Nebraska, and the defendant company moved to dismiss the action for want of jurisdiction in the court. Mr. Justice Miller again presided, and disposed of the motion in the following opinion.

> "The petition alleges that the plaintiff is a citizen of the state of Nebraska, and that the defendant is a corporation created by and existing under the laws of the United States; and the question is whether it is suable in this court by a citizen of the state of Nebraska. Under the charter of the defendant company, I have heretofore held that it was suable in this court by a citizen of another state,—Smith v. Union Pac. R. Co.,—and I am of the opinion, on consideration of the provisions of the charter, that it may sue and be sued in this district, without reference to the citizenship of the adverse party." Bauman v. Union Pacific R. Co., 3 Dillon 367, 2 Fed. Cas. 1,043.

Ten years later, in 1885, Chief Justice Waite and Mr. Justice Miller dissented from the decision of the majority of the court in the Pacific Railroad Removal Cases, upon the ground that the broad interpretation given in the Osborn case to the constitution could not properly be given to the act of March 3, 1875, and the further ground that the charters of the defendant companies, though conferring original jurisdiction upon the federal courts, did not confer upon them jurisdiction by removal. The defendant companies were The Union Pacific Railroad Company in four cases and The Texas and Pacific Railway Company in three cases, the charters of the two companies being, as we have seen, identical in their relevant provisions.

Chief Justice Waite, speaking for himself and Mr. Justice Miller, said:

> "I do not doubt the power of congress to authorize suits by or against federal corporations to be brought in the courts of the United States. That was decided in Osborn's case, and with it I have no fault to find. *Neither do I doubt that congress did, in the charters under which these corporations exist, authorize suits by or against them to be brought in the courts of the United States as well as in the courts of the states;* * * * The acts of incorporation made no provision for the removal to the courts of the United States of suits begun in a state court." Pacific Railroad Removal Cases, 115 U. S. 1 (24).

After another period of twenty-four years, there came on to be heard in this Court the original suit of Mrs. Dunn for a writ of mandamus requiring a circuit court to remand to a state court an action therein begun against The Texas and Pacific Railway Company and two of its employés for damages for the negligent killing of the plaintiff's husband. In delivering the opinion of the Court Mr. Justice Peckham said:

> "If the question were as to the right to remove a case to the federal court where the sole defendant was a corporation created by an act of congress, there can be no dispute as to the right of such a defendant to claim the removal. As the corporation derives all its rights from the law of congress, a suit brought against it on account of its action arises under the constitution or laws of the United States. Osborn v. Bank of the United States, 9 Wheat. 738, 817, 828; Pacific Railroad Removal Cases, 115 U. S. 1. *See also act of incorporation of the Texas & Pacific Railroad Company,* 16 Stat., p. 573, c. 122, March 3,

> 1871, *giving the right to the corporation* (p. 574, §1) *to sue and be sued in all the courts of law and equity within the United States.*" Matter of Dunn, 212 U. S. 374 (383-4).

Mr. Justice Peckham's reference to the charter was not a mere dictum. One of the company's contentions in that case was that it was subject to the jurisdiction of the United States circuit court for the northern district of Texas because of the express grant of jurisdiction in section 1 of its charter. See brief of Judge Dillon and others in opposition to the application for mandamus, pp. 16 and 18-19.

Thus our interpretation of the words under discussion, which is natural and preferable in itself, is supported by two considered decisions of Mr. Justice Miller, by the above quoted emphatic statement of Chief Justice Waite and Mr. Justice Miller in the Pacific Railroad Removal Cases, and by Mr. Justice Peckham's citation of the charter in the Dunn case, with a lapse of thirty-seven years between the first decision and the last. We submit that this interpretation of the statute ought not now to be disturbed.

Second Proposition

The jurisdiction of this case expressly conferred by the act of March 3, 1871, has not been taken away by the act of January 28, 1915.

ACT OF 1915

The statute of 1915 relied upon by the defendant as withdrawing federal jurisdiction of its litigations, is section 5 of chapter 22, an act to amend the judicial code of 1911. The act contains no general repealing clause, and contains noth-

ing else relevant in any way to the contents of section 5, which is only three lines long, and reads as follows (38 Stat. at L. 804):

> "Sec. 5. No court of the United States shall have jurisdiction of any action or suit by or against any railroad company upon the ground that said railroad company was incorporated under an act of congress."

FIRST POINT

As a matter of practical fact, with which congress could deal as such, federal incorporation is a ground of federal jurisdiction.

Authorities

Magee v. Union Pac. R. Co., 2 Sawyer 447, 16 Fed. Cas. 390; Union Pac. R. Co. v. McComb, 1 Fed. 799; Texas & Pac. Ry. Co. v. McAllister, 59 Texas 349; Myers v. Union Pac. Ry. Co., 16 Fed. 292; Pacific Railroad Removal Cases, 115 U. S. 1; Leather Manufacturers' Bank v. Cooper, 120 U. S. 778; Petri v. Commercial Nat. Bank, 142 U. S. 644; Butler v. National Home for Soldiers, 144 U. S. 64; Wash. & Idaho R. Co. v. Coeur d'Alene Ry. & Nav. Co., 160 U. S. 77; Texas & Pac. Ry. Co. v. Cody, 166 U. S. 606; Continental Nat. Bank v. Buford, 191 U. S. 119; Texas & Pac. Ry. Co. v. Archibald, 170 U. S. 665; Texas & Pac. Ry. Co. v. Barrett, 166 U. S. 617; Texas & Pac. Ry. Co. v. Behymer, 189 U. S. 468; Charnock v. Texas & Pac. Ry. Co., 194 U. S. 432; Texas & Pac. Ry. Co. v. Dashiell, 198 U. S. 521; Texas & Pac. Ry. Co. v. Gentry, 163 U. S. 353; Texas & Pac. Ry. Co. v. Swearingen, 196 U. S. 51; Texas & Pac. Ry. Co. v. Watson, 190 U. S. 287; Texas & Pac. Ry. Co. v. Eastin & Knox, 214 U. S. 153; Texas & Pac. Ry.

Co. v. Howell, 224 U. S. 577; Texas & Pac. Ry. Co. v. Harvey, 228 U. S. 319; Texas & Pac. Ry. Co. v. Stewart, 228 U. S. 357; Texas & Pac. Ry. Co. v. Rosborough, 235 U S. 429; Texas & Pac. Ry. Co. v. Hill, 237 U. S. 208; Texas & Pac. Ry. Co. v. Bigger, 239 U. S. 330.

Argument

While from the beginning the judicial power of the United States has extended to all cases in law and equity arising under the constitution, laws or treaties of the United States, the clause of the constitution creating this power (art. 3, §2) is not self-acting, and the extent and manner of the exercise of such power by the inferior courts of the nation are entirely within the discretion of congress.

Except for the period of about one year while section 11 of the act of February 13, 1801 (2 Stat. at L. 89), was in force, we believe that congress never undertook to exercise this power in any broad and general way prior to its passage of the act of July 27, 1868 (15 Stat. at L. 226). By this act, which in substance was carried forward into the Revised Statutes of 1873 as section 640, and which in that form continued in force until its repeal in 1887, it was provided that a federal corporation other than a bank might remove to the appropriate federal court a suit at law or in equity brought against it in a state court, upon filing a verified petition therefor, stating that it had "a defense arising under or by virtue of the constitution of the United States, or any treaty or law of the United States", and giving bond. Evidently congress in 1868 discriminated between a real federal question, and those constructive federal questions which inhere in every suit by or against a company having a federal charter. The

act of March 3, 1875, as construed in 1885 in the Pacific Railroad Removal Cases, rendered section 640 of the Revised Statutes a dead letter, and it was repealed in 1887.

By the act of March 3, 1875 (18 Stat. at L. 470), which in this particular was not changed by the act of March 3, 1887 (24 Stat. at L. 552), the circuit courts were given jurisdiction "of all suits of a civil nature at common law or in equity" involving a prescribed amount, "and arising under the constitution or laws of the United States, or treaties made, or which shall be made, under their authority."

Under this statute there grew up a doctrine, which prior to 1915 had hardened into what was practically an independent rule of law so firmly established as not to be affected by the changes in phraseology found in the corresponding clause of section 24 of the judicial code of 1911,—a rule of law to the effect that there was immanent in every suit by or against a federally incorporated company a federal question of such character as to give jurisdiction to the federal courts. Under this rule a federal question always existed constructively in a suit by or against a company incorporated under an act of congress, regardless of the existence or non-existence as a matter of fact of any dispute involving the validity, interpretation or application of a law of the United States; and this constructive federal question gave jurisdiction to the federal courts.

In 1873 The Union Pacific Railroad Company undertook to remove a personal injury action from a state court to a United States circuit court under the provisions of the act of July 27, 1868, upon the ground that it was incorporated under an act of congress, and that inasmuch as it had a federal charter, by virtue of that fact alone it had a de-

fense arising under a law of the United States. The circuit court remanded the cause, since it appeared that the defense did not involve the construction of any law of the United States, and that a correct decision upon the merits depended entirely upon common law principles wholly independent of any statute law. Magee v. Union Pacific R. Co., 2 Sawyer 447, 16 Fed. Cas. 390.

In 1880 the Union Pacific Railroad Company sued McComb in a state court in New York for the recovery of moneys alleged to have been obtained by fraud. McComb removed the case to the circuit court for the southern district of New York upon the ground that the plaintiff was a corporation created by an act of congress and that the suit and the matters in dispute therein arose under the laws of the United States. The company moved to remand upon the ground that the matters in dispute in the suit in nowise concerned or were involved in, or were controlled by, any of the laws of the United States, except in so far as the same might be concerned by the fact that the plaintiff was incorporated by an act of congress. Upon these pleadings and the application thereto of the reasoning in the Osborn case Judge Blatchford held that the cause presented a federal question, and was removable under the act of March 3, 1875. The federal question involved of course was only the constructive federal question, inherent in the charter, and not any actual controversy whose determination depended upon the application of a law of the United States. Union Pacific R. Co. v. McComb, 1 Fed. 799.

In 1885 this Court decided together seven removal cases, four against Union Pacific Railway Company, and three against The Texas and Pacific Railway Company. Six of them were personal injury or wrongful death cases, and the seventh was

an appeal by the Union Pacific from an award of damages in its favor upon the condemnation of some of its property in Kansas City. There was no contention that any of these cases involved an actual federal question as distinguished from what we have called a constructive federal question. In some of the cases removal was sought under section 640 of the Revised Statutes, upon the theory that because the defendant was a federal corporation it necessarily had a defense arising under a law of the United States. This claim appears not to have been decided by this Court. In one of the cases a state court in Kansas refused to grant the petition for removal, and the writ of error was taken from a judgment of the supreme court of Kansas affirming the judgment of the court below. The three cases of The Texas and Pacific Railway Company all came from the supreme court of Texas, which in like manner had affirmed judgments of the courts below denying petitions for removal. Three of the cases against Union Pacific Railway Company came respectively from the circuit courts for the district of Kansas, the western district of Missouri and the district of Nebraska, all of which courts had held themselves without jurisdiction.

The understanding of the courts whose judgments were up for review, as to the nature of the question involved, may be indicated by quotations from two of the written opinions rendered. In the case of Texas & Pacific Ry. Co. v. McAllister, 59 Texas 349, wherein the company's reliance seems to have been placed upon article 640 of the Revised Statutes, the supreme court of Texas said (p. 361):

> "It is urged that a corporation chartered by act of the general government has in every case a defense under the statute incorporat-

ing it. If so, the fact that it was thus chartered is all that is necessary to be known to the court in order to entitle it to removal. Why, then, did the statute require the superfluous statement of the additional fact that the corporation had a defense under a United States law? And why did it require such fact to be sworn to, if the court was bound judicially to know it? These considerations, together with the authorities cited, lead us to the conclusion that the mere statement in an application for removal that the corporation chartered by United States law has a defense under its act of incorporation is insufficient, when neither the said act, nor any of the papers or proceedings in the cause show that such defense exists or can possibly arise upon the trial, and is not sufficient to entitle the applicant to a removal."

In another of the cases, Myers v. Union Pacific Ry. Co., 16 Fed. 292, in which case the company relied upon the act of March 3, 1875, Judge McCrary said:

> "In the present case the removal was sought upon the latter ground" (the existence of a federal question), "and it appears from the record that it is based upon the single alleged fact that the defendant is a corporation organized under the laws of the United States; from which fact the inference is sought to be drawn that the case of the plaintiff, being a suit to recover damages for personal injuries caused by the defendant's negligence, is a case arising under the laws of the United States. To this proposition I do not agree. The inference does not necessarily follow from the fact. The removal is sought on account of the character of the subject-matter of the suit, not because of the character of the parties. It is necessary that the record should show affirmatively that the

> cause of action or defense arises upon some construction of, or upon a claim of right arising under, some law of the United States, or of a treaty, or of some provision of the constitution of the United States. A suit against the defendant corporation is not necessarily a case which arises under a law of the United States within the meaning of the removal acts."

To the question thus presented and the statute raising the same, the majority of the Court, speaking through Mr. Justice Bradley, with Chief Justice Waite and Mr. Justice Miller dissenting, applied the reasoning which in the Osborn case Chief Justice Marshall had applied to the constitutional question there involved. As there was not in any one of the seven cases any real dispute determinable by reference to a law of congress, and as in each case the only federal question was the constructive federal question inhering in the fact that the company was chartered by act of congress, the decision of the court necessarily was a decision of the question whether a suit against a federally incorporated company was by virtue of that sole fact, or upon that sole ground, removable from the state court to the federal court. Accordingly, the decision of the Court was announced in these words by Mr. Justice Bradley.

> "We are of opinion that corporations of the United States, created by and organized under acts of congress, like the plaintiffs in error in these cases, are entitled as such to remove into the circuit court of the United States suits brought against them in the state courts, under and by virtue of the act of March 3, 1875, on the ground that such suits are suits 'arising under the laws of the United States.' "

Of course, there was elaborate reasoning back of this decision. But the net result was that as a practical matter federal corporations were held to be entitled as such, and without showing anything more than the fact of federal incorporation, to remove their suits from the state courts to the federal courts, because there was always present a constructive federal question in such a suit, though no real federal question in fact existed. Pacific Railroad Removal Cases, 115 U. S. 1.

And so ever since the law has been held to be; and in such terms ever since courts, lawyers and congress usually have spoken of it.

In 1886, disregarding the provisions of the act of July 12, 1882, a national bank sought to remove from a state court to a federal court a suit brought against it to recover a balance on account, and in this Court Chief Justice Waite used the following language in stating the case, which was held to be not removable.

> "On the 23d of September, 1886, the bank presented its petition to the state court for the removal of the suit to the circuit court of the United States for the southern district of New York under the act of March 3, 1875, *on the ground of its being a national bank, and consequently the suit was one arising under the laws of the United States.* The cause was duly entered in the circuit court October 4, 1886, and, on the 9th of the same month, Cooper moved that it be remanded. This motion was granted October 22, because §4 of the act of July 12, 1882, had taken away from national banks the right of removing suits under the act of 1875 *on the ground of their being federal corporations.*" Leather Manufacturers' Bank v. Cooper, 120 U. S. 778.

In 1890 a national bank in Chicago filed in a United States circuit court in Texas a suit against a citizen of Texas for the recovery of a debt, the ground of federal jurisdiction being diversity of citizenship. It was claimed by the defendant that by the act of July 12, 1882, and the act of March 3, 1887, jurisdiction had been withdrawn from the federal courts in such cases. The circuit court retained jurisdiction, and rendered a judgment in favor of the plaintiff; and in announcing the affirmance thereof by this Court Chief Justice Fuller used language which seems to us illuminating as applied to the question now under consideration. He said (citations omitted):

> (Speaking of the state of the law before the act of 1882) "Suits by or against national banks might therefore be brought or removed upon the ground of diverse citizenship, or of subject matter, since as they were created by congress, and could acquire no right, make no contract and bring no suit, which was not authorized by a law of the United States, a suit by or against them was necessarily a suit arising under the laws of the United States. And of course national banks as well as state banks and individuals might bring or remove suits otherwise arising under the constitution, laws or treaties of the United States" (quotation from the act of July 12, 1882, omitted). "Hence the jurisdiction of the circuit courts over suits by or against national banks could no longer be asserted *on the ground of their federal origin*, as they were placed in the same category with banks not organized under the laws of the United States. *So far as the mere source of its incorporation rendered suits to which a national bank might be a party, cognizable by the circuit courts, that was taken away, but the jurisdiction which those courts might exercise in such suits when arising* be-

> tween citizens of different states or *under the constitution or laws of the United States, except in that respect, remained unchanged.*" Petri v. Commercial National Bank, 142 U. S. 644.

National Home for Disabled Volunteer Soldiers, a federal corporation, sued its former treasurer to recover an alleged shortage in his accounts,—an action which obviously involved no real federal question, but only the constructive federal question growing out of its incorporation under a law of the United States. The case was removed by the defendant to the federal court upon grounds thus stated by Mr. Justice Harlan in delivering the opinion of this Court upon appeal:

> "Upon the petition of the defendant the case was removed for trial into the circuit court of the United States *upon the ground that the plaintiff was a corporation created by an act of congress,* and the suit was, therefore, one arising under the laws of the United States." Butler v. National Home for Disabled Volunteer Soldiers, 144 U. S. 64.

In Washington & Idaho R. Co. v. Coeur d'Alene Ry. & Nav. Co., 160 U. S. 77, Northern Pacific Railroad Company, a federal corporation, was a nominal party as the tenant in possession of property in dispute, but no real federal question depended for its solution upon the application of any law of the United States. The case was removed to the federal court, and jurisdiction thereof was retained. As to this matter Mr. Justice Shiras, speaking for this Court, said (p. 93):

> "The circuit court of appeals maintained the jurisdiction of the circuit court, *on the ground that there was a federal question in-*

volved in the fact that the Northern Pacific Railroad Company, a corporation created by the laws of the United States, was a party to the action. We agree with that court in regarding such a fact as conferring jurisdiction on the circuit court."

Texas & Pacific Ry. Co. *v.* Cody, 166 U. S. 606, was a personal injury suit begun in a state court and removed by the defendant to a federal court. The plaintiff's petition alleged that the defendant was a private corporation created and existing under the laws of the state of Texas. The defendant's petition for removal alleged that it was a corporation incorporated under certain acts of congress, mentioning them, and that the suit was one arising under the laws of the United States within the meaning of the act of 1875, as amended by the acts of 1887 and 1888. This Court held that in these circumstances judicial cognizance would be taken of the fact that the defendant company was a federal corporation, and not a corporation existing under the laws of the state of Texas, and that by reason of that fact it was entitled to remove the cause in accordance with the decisions of this court in Pacific Railroad Removal Cases.

In Continental National Bank v. Buford, 191 U. S. 119, a national bank of Memphis sued citizens of Arkansas in the United States circuit court in Arkansas, to recover upon a cause of action created by statutes of Arkansas. This Court dismissed for want of jurisdiction a writ of error to the circuit court of appeals, because the jurisdiction of the circuit court was dependent solely upon diversity of citizenship. In delivering the opinion of this Court Mr. Justice Harlan said:

"No ground whatever of jurisdiction in the circuit court appears in the complaint or else-

where in the record, other than diversity in the citizenship of the parties, unless it can be said that *by reason alone of the plaintiff bank having been organized under an act of congress* the suit is one arising under the laws of the United States. This, however, could not be said of the present suit, if regard be had to the acts of congress defining and regulating the jurisdiction of the courts of the United States" (discussion of the acts of 1875, 1882, 1887 and 1888 omitted). "The necessary effect of this legislation was to make national banks, for purposes of suing and being sued in the circuit courts of the United States, citizens of the states in which they were respectively located, and to withdraw from them the right to invoke the jurisdiction of the circuit courts of the United States *simply upon the ground that they were created by and exercised their powers under acts of congress.* No other purpose can be imputed to congress than to effect that result. Of course, notwithstanding the acts of 1882 and 1888, there remained to a national bank, independently of its federal origin, and as a citizen of the state in which it was located, the right to invoke the original jurisdiction of the circuit courts in any suit involving the required amount, and which, *by reason of its subject matter, and not by reason simply of the federal origin of the bank,* was a suit arising under the constitution or laws of the United States. Treating the plaintiff as a citizen of Tennessee, its right to sue the defendant in the federal court, sitting in Arkansas, was beyond dispute. But, as already suggested, it did not assert any right, privilege or immunity that was dependent in any degree upon the constitution or laws of the United States. *As jurisdiction could not arise merely from the federal origin of the plaintiff bank, and as no federal question was involved in the suit,* it must be taken that

> the only ground of jurisdiction in the circuit court was diverse citizenship of the parties. *If, apart from the fact that the plaintiff bank was a federal corporation, the suit had been one arising under the constitution or laws of the United States*, it could not have been said that the jurisdiction of the circuit court depended entirely upon diverse citizenship of the parties."

In addition to the cases above cited, those below mentioned, dealing with the appellee in the case at bar, illustrate how completely established the doctrine has become that a federal charter gives federal jurisdiction.

Texas & Pacific Ry. Co. v. Gentry, 163 U. S. 353, was a personal injury suit brought in a state court and removed to a federal court. Mr. Justice Harlan said:

> "It was brought in the circuit court of Dallas County, Texas, and was removed into the circuit court of the United States for the northern district of Texas on the petition of *the defendant, a corporation created under acts of congress.*"

Texas & Pacific Ry. Co. v. Barrett, 166 U. S. 617, was a personal injury suit removed by the railway company from a state court to a federal court. The plaintiff's petition did not show that the company was incorporated by act of congress. The petition for removal probably did show it. Chief Justice Fuller said:

> "The petition for removal was sufficient, and *as the company was created by act of congress the circuit court properly entertained jurisdiction.*"

Texas & Pacific Ry. Co. v. Archibald, 170 U. S. 665, was a personal injury suit removed by the defendant from a state court to a federal court. Mr. Justice White said:

> "This suit, commenced in a state court, was removed to the circuit court of the United States for the eastern district of Texas, *on the ground that the defendant was incorporated under the laws of the United States.*"

Texas & Pacific Ry. Co. v. Behymer, 189 U. S. 468, was a personal injury suit removed to a federal court by the defendant railway company. Mr. Justice Holmes said:

> "This is an action for personal injuries brought by an employé against a railroad company. It was tried in the circuit court, where the plaintiff had a verdict. It then was taken to the circuit court of appeals on a writ of error and bill of exceptions by the company, 112 Fed. Rep. 35, and now is brought here on a further writ of error, *the company being a United States corporation.*"

Charnock v. Texas & Pacific Ry. Co., 194 U. S. 432, was a suit for damages for the destruction of cotton by fire, of which Mr. Justice McKenna said:

> "The case was removed from the civil district court in and for the parish of Orleans to the United States circuit court for the eastern district of Louisiana by defendant, *on the ground that it was a corporation organized by an act of congress of the United States.*"

Texas & Pacific Ry. Co. v. Swearingen, 196 U. S. 51, was a personal injury suit removed by the defendant to the federal court upon the ground thus stated by Mr. Justice White:

> "This suit was commenced in a state court by W. W. Swearingen, the defendant in error, and, on the application of the defendant, the Texas & Pacific Railway Company, was removed to the circuit court of the United States as one arising under the laws of the United States, *because the railway company was chartered under an act of congress.*"

Texas & Pacific Ry. Co. v. Dashiell, 198 U. S. 521, was a personal injury suit removed by the defendant to the federal court, of which Mr. Justice McKenna said:

> "This action was originally brought in the district court of Tarrant County, in the state of Texas, and removed by the railway company to the United States circuit court for the northern district of Texas *on the ground that the railway company is a corporation under the law of the United States.*"

Texas & Pacific Ry. Co. v. Howell, 224 U. S. 577, was a personal injury suit of which Mr. Justice Holmes said:

> "The case was begun in the state court and was removed to the circuit court, and is brought here, *solely on the ground that the plaintiff in error has a charter from the United States. But for that accident, which has no bearing upon the questions raised, the case would stop with the circuit court of appeals.* Under such circumstances we go no further than to inquire whether plain error is made out."

Texas & Pacific Ry. Co. v. Harvey, 228 U. S. 319, was a wrongful death suit, removed by the defendant from a state court and of which Mr. Justice Day said:

> "This case comes to this court from the circuit court of appeals for the fifth circuit *because The Texas & Pacific Railway Company is a federal corporation.*"

Texas & Pacific Ry. Co. v. Stewart was a personal injury suit at page 357 of the same volume, removed from state court to federal, and of it Mr. Justice Day said:

> "Judgment upon verdict in the United States circuit court for the eastern district of Texas, to which the case had been removed, was affirmed by the United States circuit court of appeals for the fifth circuit. The case is brought here *because of the fact that the railway company was organized as a federal corporation.*"

Texas & Pacific Ry. Co. v. Rosborough, 235 U. S. 429, was an action for damages caused by a fire which resulted from escaping sparks. Mr. Justice McReynolds said of it:

> "This cause was removed from the state court to the district court and comes here *solely because plaintiff in error is incorporated under an act of congress.* We go no further than to inquire whether there is plain error."

Texas & Pacific Ry. Co. v. Hill, 237 U. S. 208, was a personal injury suit removed from a state court to a federal court, wherein the plaintiff recovered a judgment that was affirmed by the circuit court of appeals. The removal was had after the judicial code of 1911 took effect. In overruling a motion to dismiss a writ of error Mr. Chief Justice White said:

> "*As a corporation created by an act of congress this plaintiff in error is inherently enti-*

> *tled to invoke our jurisdiction.* Hence the motion to dismiss is without merit."

Texas & Pacific Ry. Co. v. Bigger, 239 U. S. 330, was a removed personal injury suit, wherein a judgment for the plaintiff was affirmed by the circuit court of appeals in a memorandum decision. It is the latest of the appellee's cases decided by this Court. There was a motion to dismiss, as to which Mr. Justice McKenna said shortly (p. 334):

> "The motion to dismiss is overruled. *The railway company is a federal corporation* and the questions raised are not frivolous. We pass, therefore, to the merits."

We think therefore that there is a large class of cases of which it is proper to say, and of which it long has been usual to say, that the federal courts have jurisdiction of them upon the ground that a company litigant was incorporated under an act of congress. This class is made up of the cases whereof the federal courts have jurisdiction only because there is involved constructively in every suit by or against a company chartered under act of congress a federal question growing out of the mere fact of federal incorporation, even though the provisions of the charter are in no wise brought into actual controversy. It does not include any case whereof the federal courts have jurisdiction by reason of the existence of an actual, as distinguished from a constructive, federal question, or by reason of an express grant of jurisdiction, or by reason of diversity of citizenship, or upon any other ground.

How important this class is, is indicated by the fact that it includes most of the cases which have reached this Court involving federally chartered

companies. We have been curious enough to look at 97 cases of The Texas and Pacific Railway Company reported in volumes 115 to 239 of the reports of this Court, beginning with the Pacific Railroad Removal Cases. Our examination has been hasty, and in many of the cases the report does not disclose the nature of the case, the ground of jurisdiction, or the court of origin. Therefore, the figures to follow are only approximately correct. In about 79 of the cases the railway company was the moving party here. About 34 of them were disposed of by this Court in memorandum decisions or orders, and of these about 17 were dismissed by the railway company. About 23 cases came from state courts. Of the other 74 about 24 were removal cases, about 10 were cases brought originally in federal courts, and as to the remainder we do not know. Apparently more than 70 per cent. were removal cases. About 32 of them were personal injury or wrongful death suits, about 10 were suits for damages to property, about 14 were miscellaneous suits, and as to the remainder we do not know. Apparently about two-thirds of the cases were damage suits. More than 50 of the cases came here from circuit courts of appeals since their organization in 1891, and in almost all of these the sole ground of jurisdiction here was the constructive federal question inherent in the federal charter. In about 33 of the 74 cases coming here from the lower federal courts, the only ground of federal jurisdiction was the constructive federal question inherent in the federal charter, in about 8 other grounds of jurisdiction appeared, and as to the remainder we do not know. Therefore it seems that in about 80 per cent. of the cases the one and only ground of jurisdiction

was the fact that the company was incorporated by act of congress.

SECOND POINT

A general act will not be held to repeal a provision of an earlier special act, unless the intention of congress to accomplish such repeal is unmistakably manifest.

Authorities

Dwarris on the Statutes (2nd ed.), 532; Sedgwick on Construction of Statutory Law (2nd ed.), 97; Maxwell on Interpretation of Statutes (5th ed.), 131, 285, 291; Beal's Rules of Legal Interpretation (2nd ed.), 463; Endlich on Interpretation of Statutes, §§ 223, 228-9; 1 Sutherland on Statutory Construction (2nd ed.), §§ 274-5; Black on the Interpretation of Laws (2nd ed.), 328; Broom's Legal Maxims (8th ed.), 19; Ex Parte Crow Dog, 109 U. S. 556; Rodgers v. United States, 185 U. S. 83; United States v. Nix, 189 U. S. 199.

Argument

The act of 1915 is a general act, which contains no repealing clause, which mentions no particular railroad, and which deals with a general situation having its origin in the mere fact of federal incorporation, and not in any specific provision of the charter of any railroad company. The express grant of jurisdiction relied upon by the plaintiff is found in a special act incorporating the defendant company, and whose provisions it

must be presumed were carefully considered by congress in 1871 with reference to this one company.

The general rule was thus stated by Mr. Justice Brewer in Rodgers v. United States, 185 U. S. 83 (87).

> "It is a canon of statutory construction that a later statute, general in its terms and not expressly repealing a prior special statute, will ordinarily not affect the special provisions of such earlier statute. In other words, where there are two statutes, the earlier special and the later general—the terms of the general broad enough to include the matter provided for in the special—the fact that the one is special and the other is general creates a presumption that the special is to be considered as remaining an exception to the general, and the general will not be understood as repealing the special, unless a repeal is expressly named, or unless the provisions of the general are manifestly inconsistent with those of the special."

THIRD POINT

The history of the passage of section 5 of the act of January 28, 1915, through congress shows that congress intended to take away from the federal courts only their jurisdiction of the litigations of railroad companies resting upon the ground that such companies were incorporated under act of congress, or in other words only such jurisdiction as was dependent upon the existence of a constructive federal question arising from the mere fact of federal incorporation.

Preliminary

For the purpose of ascertaining the intent of congress it is proper to consider the development of the act itself, the reports of committees relative thereto, and other similarly definite and reliable indicia.

> Church of the Holy Trinity v. United States, 143 U. S. 457 (464); Binns v. United States, 194 U. S. 486 (495); United States v. Nakashima, 87 C. C. A. 646, 160 Fed. 842 (846); Symonds v. St. Louis & S. E. Ry. Co., 192 Fed. 353 (355-6).

It also is proper in interpreting a statute to consider the environment, the history of the times, and the particular evil which was pressing upon the attention of congress, and for which it was seeking a remedy. For this purpose the court may avail itself of all accessible sources of information, including the proceedings and debates in congress.

> Church of the Holy Trinity v. United States, 143 U. S. 457 (463-4); Standard Oil Co. v. United States, 221 U. S. 1 (50); United States v. Union Pacific R. Co., 91 U. S. 72 (79); Taylor v. United States, 81 C. C. A. 197, 152 Fed. 1 (4-5); Symonds v. St. Louis & S. E. Ry. Co., 192 Fed. 353 (355-6); Maxwell on the Interpretation of Statutes (5th ed.), 37; Black on the Interpretation of Laws (2nd ed.), §91.

Argument

The statute now embodied in section 5 of the act of January 28, 1915, was a house bill, which

passed the house originally without opposition in form as follows:

> "That an action or suit by or against a railroad company incorporated and existing under an act of congress shall not be regarded as a case arising under a law of the United States within the meaning of the statutes regulating the jurisdiction of the courts of the United States, unless there be some sufficient reason for so regarding it independently of the incorporation and existence of the railroad company under an act of congress." 52 Congressional Record 282 and 283.

In the house Mr. Floyd, in behalf of the judiciary committee, explained the bill as follows:

> "The courts have held that a railroad company chartered by congress has a right to remove a cause to the federal courts on the sole ground that it is a corporation authorized by congress. This bill was introduced by the gentleman from Texas (Mr. Beall), and the Texas Pacific road, operating in Texas, was incorporated by act of congress, and is the only road in the state of Texas that has the right to transfer its cases to the federal court on the ground that it was incorporated by congress, thereby giving it an advantage over other railroad corporations operating in the state of Texas. This amendment provides that if a railroad company chartered by act of congress takes its cases to the federal court it must allege some other ground provided by statute for the transfer of cases from the state to federal courts. In other words, it so amends the law that they cannot take it to the federal courts on the sole ground that the corporation was chartered by congress." 52 Congressional Record 283.

By amendment proposed by the judiciary committee of the senate, the section was given its present form, and in explaining this change in behalf of the committee Senator Chilton said:

> "The amendment was proposed, and while it occurs to me that the language of the house bill and that of the amendment mean the same thing, the amendment was unanimously agreed to by the judiciary committee. * * * As I said before, that is simply changing the language of the section as it passed the house. The senate committee thought that the language of the amendment is a better way to express the purpose intended." 52 Congressional Record 1544.

From these proceedings it seems to us perfectly obvious that the evil at which congress was aiming was the defendant company's practice of transferring its cases from the state courts to the federal courts "on the ground that it was incorporated by congress". Evidently the house understood that it merely was so amending the law that such a company could not take its cases "to the federal courts on the sole ground that the corporation was chartered by congress". And so, as the house passed the bill originally, it provided only that a suit by or against a federally chartered railroad company should not be deemed one arising under a law of the United States unless there was some reason for so regarding it independently of the incorporation of the company under an act of congress. It is equally clear that the senate committee meant not to make any very material change in the scope of the bill, but to accomplish in a better way the same purpose which the house committee had sought to accomplish.

It is plain that the two judiciary committees, and the two houses which acted upon the reports of the committees without opposition, did not intend to take away jurisdiction in cases by or against railroad companies when there was sufficient reason for regarding such cases as arising under a law of the United States independently of the mere fact that the litigant company was incorporated under an act of congress. They did mean to take away all jurisdiction dependent upon the constructive existence of a federal question growing out of the sole fact of federal incorporation without more.

FOURTH POINT

If the act of 1915 be given the construction for which we contend it will accomplish the purpose of congress.

Four times in the course of his short statement to the house in behalf of the judiciary committee, Mr. Floyd mentioned the removal of causes from the state courts to the federal courts upon the ground of federal incorporation, and he mentioned no other evil to be cured, and no object to be gained by the proposed legislation other than the curing of this particular evil.

The right of removing causes from the state courts to the federal is now regulated by section 28 of the judicial code of 1911, which code constitutes a "title", styled "the judiciary", ready for insertion in a new compilation of the Revised Statutes. This section provides:

> "Any suit of a civil nature, at law or in equity, arising under the constitution or laws

> of the United States, or treaties made, or which shall be made, under their authority, *of which the district courts of the United States are given original jurisdiction by this title,* which may now be pending or which may hereafter be brought, in any state court, may be removed by the defendant or defendants therein to the district court of the United States for the proper district. Any other suit of a civil nature, at law or in equity, *of which the district courts of the United States are given jurisdiction by this title,* and which are (sic) now pending or which may hereafter be brought, in any state court, may be removed into the district court of the United States for the proper district by the defendant or defendants therein, being non residents of that state."

Original jurisdiction, so far as conferred by the judicial code is conferred by section 24. The jurisdiction for whose exercise we now are contending was conferred by the act of March 3, 1871, and not by the judicial code. Therefore, section 28 of the judicial code, which limits jurisdiction by removal to cases whereof original jurisdiction is given to the federal courts "by this title", does not confer upon the federal courts jurisdiction by removal in those cases of which original jurisdiction is dependent upon the express grant contained in the act of March 3, 1871.

It follows that if the act of 1915 be construed in accordance with our contention, congress will have accomplished that which it sought to do. It will have relieved this Court from the burden of cases brought here by writ of error from the circuit courts of appeals upon the ground that the jurisdiction of the district court was not dependent solely upon diversity of citizenship. It will

have relieved the district courts and circuit courts of appeals of the numerous damage suits removed from the state courts upon the ground that the company was incorporated under act of congress. It will have taken away entirely the possibility of federally chartered railroad companies dragging into the federal courts by removal upon the ground of a federal question unwilling plaintiffs who preferred to sue in another jurisdiction, except in those cases wherein a real as distinguished from a constructive federal question is involved.

2

JURISDICTION BY REASON OF FEDERAL QUESTION

Specifications of Error

1. The court erred in holding that it was without jurisdiction to hear and determine said cause, and in dismissing the amended bill of complaint therein because of such supposed want of jurisdiction.

3. The court erred in holding that there did not remain to it after the taking effect of the act of congress of January 28, 1915, jurisdiction to hear and determine said cause as a suit of a civil nature, in equity, where the amount in controversy exceeds, exclusive of interest and costs, the sum or value of three thousand dollars, and arises under the constitution or laws of the United States.

First Proposition

There exist in this case federal questions which give rise to federal jurisdiction, unless federal jurisdiction has been taken away by the act of 1915.

STATEMENT

By the act of March 3, 1871 (16 Stat. at L. 573), congress incorporated Texas Pacific Railroad Company. Sections 11 and 14 contained detailed provisions authorizing and regulating the borrowing of money by the company upon mortgage security.

By the act of May 2, 1872 (17 Stat. at L. 59), it was provided that Texas Pacific Railroad Company thereafter should be called The Texas and Pacific Railway Company, and by sections 2 and 3 other details were added to the regulation of the company's borrowing upon mortgage of its property.

The acts of 1871 and 1872 were again supplemented by the act of March 3, 1873 (17 Stat. at L. 598), consisting of one section which still further regulated the company's bonds and mortgages.

And finally the act of June 22, 1874 (18 Stat. at L. 197), was passed, comprising only one section, which was devoted to further regulation of the mortgaging by the company of its property as security for its bonds.

All the acts subsequent to that of 1871 purported to be merely supplementary to, and not amendatory of, the preceding act or acts; and those of 1873 and 1874 were in no sense acts of incorporation.

These statutory provisions are very elaborate. They occupy about three pages of the record (Tr.,

3-7, fols. 9-21), being set forth at large in the amended bill. The terms of the bonds and mortgage also are fully set forth in the bill. Hence any question of the inconsistency of any provision of the bonds or mortgage with any provision of the statutes properly may be said to appear on the face of the amended bill, and to be capable of determination under a motion to strike.

The amended answer of defendant The Texas and Pacific Railway Company has been included in the transcript, not for the purpose of attempting to bring into the case by means thereof any federal questions not imported by the amended bill, but for the purpose of illustrating the fact that some of the federal questions raised upon the bill are actually subjects of dispute.

FIRST POINT

This case involves real and not merely constructive federal questions.

Argument

As above indicated, the provisions of the four acts of congress authorizing and regulating the issue by The Texas and Pacific Railway Company of mortgages upon its property enter into minute details; and every contested provision of the mortgage in suit must be shown to square with these provisions, or with inferences necessarily deducible therefrom, in order that the plaintiff may be entitled to its enforcement. On the other hand there may be clauses of the mortgage which the plaintiff will be entitled to have disregarded be-

cause in conflict with provisions of the acts of congress, or to have held modified by such acts, or to have construed in such a way as to avoid conflict with such acts.

There is in the mortgage in suit (Tr., 71) a clause providing that "there shall be no right of foreclosure under this mortgage for default in the payment of interest upon the bonds issued under and secured hereby, except in the event of the foreclosure of the first mortgage." This suit is brought in part for the foreclosure of the second mortgage because of default in the payment of interest, and it is not alleged that the first mortgage is under foreclosure or that there exists any default entitling the holders thereof to foreclosure. The answer (Tr., 133; marg. p. 154) sets up this clause in bar of the suit. Obviously, it must be the contention of the plaintiff that this clause either is invalid as applied to the present suit, or is to be so construed as not to be applicable to the present suit. Whether the clause is so invalid or should be so construed, is a question which must be solved in the light of and by the application of the expressed and implied provisions of the four acts of congress regulating the company's issuance of mortgages, as well as in the light of and by the application of the general rules of law.

The mortgage in suit contains also a very elaborate provision (Tr., 69-71) to the effect that the trustee may take possession of the mortgaged property and administer it, in case of the occurrence of default in the payment of interest at the full contract rate of five per cent per annum. This clause forms in part the basis for the relief sought by bill. In the answer (Tr., 138; marg. p. 160) the defendant says "that both public policy

and the law requires (sic) that said property should be administered by the officers and board of directors of this defendant, other than a committee appointed by the trustee under the second mortgage or by the bondholders secured by said second mortgage". Whether and to what extent this provision is valid, must depend largely upon the solution of the question whether and to what extent the performance of the public duties assumed by the railway company when it accepted its charter and the acts supplementary to its charter can be delegated temporarily through the mortgage to a trustee or to the bondholders; and the solution of this question in turn involves the construction and application of the acts of congress.

Again, the answer denies (Tr., 106; marg. p. 116) that property acquired by the company subsequently to the execution of the mortgage is subject to the lien thereof. The plaintiff alleges that such property is subject to its lien, and that it is entitled to an accounting thereof, and the mortgage set forth in the bill as an exhibit purports to cover after-acquired property (Tr., 20 and 61). Whether by virtue of the mortgage the plaintiff has a lien upon property acquired after the execution of the mortgage is a question which involves the power of the mortgagor to include in its mortgage a provision that the same shall cover after-acquired property, and, therefore, the examination and interpretation and application of the statutes from which it derives all its power.

The bill avers that the plaintiff has a mortgage, and by virtue thereof an enforcible lien, upon the defendant's property, and it sets forth both the mortgage and the statutes whereby the plaintiff contends that the company was empowered to

grant the lien afforded by the mortgage. Necessarily this averment raises an issue to be determined in part at least by comparing the mortgage with the statutes. That this issue is not merely potential is indicated by the unexplained allegation in paragraph 37 of the answer (Tr., 126) "that complainant has no legal or equitable lien upon any of defendant's property which it is entitled to enforce in this or any other court".

All these questions are raised by the bill and not for the first time by the answer. We have referred to the contents of the answer only to illustrate the fact that there are questions involving actually, and not merely potentially, the construction and application of the acts of congress which control the conduct of the defendant company.

SECOND POINT

A suit to enforce a railroad mortgage given by a federally chartered company necessarily involves one or more federal questions that are not merely constructive in their character.

Argument

A railroad company has only such power to mortgage its property essential to the performance of its public duties as its charter and other governing laws confer expressly or by necessary implication.

> Jones on Corporate Bonds and Mortgages, Secs. 1-4 and cases cited; Baldwin on American Railroad Law, 463; Commonwealth v. Smith, 10 Allen, 448.

Authority for each provision relied upon by the plaintiff in a suit to enforce a railway mortgage, either shown by express averment or judicially noticed by the court, is an essential element of the plaintiff's bill.

> Frye v. Bank of Illinois, 5 Gilman (10 Ill.) 332; International & Great Northern R. Co. v. Underwood, 67 Texas 589; East Line & Red River Ry. Co. v. Rushing, 69 Texas 307.

A question determinable by the interpretation and application of an act of congress is a federal question.

> Ames v. Kansas, 111 U. S. 449; Howard v. United States, 184 U. S. 676; Cummings v. City of Chicago, 188 U. S. 410; Male v. Atchison, T. & S. F. Ry. Co., 240 U. S.——; Oregon v. Three Sisters Irrigation Co., 158 Fed. 346; Bowers v. First National Bank, 190 Fed. 676; McGoon v. Northern Pacific Ry. Co., 204 Fed. 998.

All of the cases last above cited, except the McGoon case, are cases like the one at bar in which the litigation grew out of a contract made by authority of an act of congress.

It is not essential to the existence of federal jurisdiction by reason of the presence of a federal question that the litigation finally turn upon such question. This point, of course, is sustained by the entire line of cases, beginning with the Pacific Railroad Removal Cases, 115 U. S. 1, wherein it has been held that federal questions giving rise to fed-

eral jurisdiction are constructively present in every suit by or against a federally chartered company. But our present meaning is better illustrated by two recent cases.

In the Metropolitan Railway Receivership case, 208 U. S. 90, it was held that there existed a controversy for jurisdictional purposes in a suit for receivership of a railway, notwithstanding the defendant admitted all the allegations of the bill and consented to the appointment of a receiver. There was in that case no dispute of any kind, using the word dispute in its ordinary sense; but there was what Mr. Justice Peckham called a "justiciable claim" which had not been satisfied, and for the enforcement of which the machinery of the courts was called into action. In this sense there existed a jurisdictional controversy.

In Male v. Atchison, T. & S. F. Ry. Co., 240 U. S. ——, the plaintiff sought to hold the defendant liable on bonds issued by another company of which it was said that it was practically out of existence, and had not been and could not be served with process, but which had been incorporated by act of congress. It did not appear that there was any question as to the validity of the bonds as against the federal corporation which issued them; and that corporation, though named as a defendant in the bill, really was not a party to the suit. Yet it was held that a federal question, carrying with it federal jurisdiction, necessarily inhered in the fact that judgment was sought on bonds issued by the federal corporation.

See also Walker v. Windsor Nat. Bank, 5 C. C. A. 421, 56 Fed. 76, and Huff v. Union Nat. Bank, 173 Fed. 333, of both of which we shall have more to say later.

Second Proposition

The act of January 28, 1915, does not deprive the federal courts of their jurisdiction of this case arising out of the federal questions therein involved.

FIRST POINT

The jurisdiction taken away from the federal courts by the act of January 28, 1915, is only that jurisdiction which exists by reason of the constructive presence of a federal question arising out of the mere fact that the company litigant was incorporated under an act of congress.

Argument

We do not wish to add much here to the general discussion of the effect of the act of 1915 in connection with the second proposition of the argument on the existence of jurisdiction by express grant.

Congress has taken away from the federal courts their jurisdiction of the litigations of national banks resting upon the sole ground that such banks are organized under an act of congress, by acts which differ widely in form from the act of January 28, 1915, but to which this court has attributed in this respect the same net result that is literally expressed in the act of 1915.

> Leather Manufacturers' Bank v. Cooper, 120 U. S. 778; Petri v. Commercial Nat. Bank, 142 U. S. 644; Continental Nat. Bank v. Buford, 191 U. S. 119. See pp. 22-27, supra.

Bowers v. First Nat. Bank, 190 Fed. 676, was a suit by one of the parties to an escrow agreement against a national bank which was the escrow-holder, to recover damages from the bank for an alleged violation of its agreement in the premises. The complaint alleged that the defendant was a national banking association. The defendant removed the case from the state court in which it was instituted to a federal court, upon the ground that it involved a federal question. The plaintiff moved to remand. In the consideration of that motion the defendant urged, and the court held: (1) that by alleging that the defendant was a national banking association, the plaintiff, in substance, had included in his complaint all the provisions of the national banking act; and (2) that therefore the question whether a national bank had power under the provisions of the national banking act by virtue of which it was incorporated to bind itself as an escrow-holder was raised by the complaint; and (3) that it was such a federal question as gave jurisdiction over the cause to the proper federal court. Jurisdiction growing out of the mere fact that the bank was incorporated under an act of congress had been taken away from the federal courts by other acts of congress, but jurisdiction to determine a real question whether the bank had power under its charter to make a contract which the complaint alleged that it had made had not been taken away.

Walker *v.* Windsor Nat. Bank, 5 C. C. A. 421, 56 Fed. 76, was a suit on the official bond of the cashier of a national bank, which fact was held by the circuit court of appeals for the first circuit to import a federal question giving federal jurisdiction, although the acts of 1882 and 1888 had taken away such jurisdiction as rested upon

the sole ground of federal incorporation. In that connection Judge Putnam said:

> "The bond in the case at bar was conditioned, not only for the faithful execution of the office of cashier by the principal in it, but also that he would perform the duties thereof, 'according to law, and the by-laws' of the bank. Even without the express use of the words quoted the condition of the bond of a cashier of a national banking association, providing in terms only for the faithful performance of the duties of his office, or of any bond given as contemplated by section 5136, Rev. St., would inevitably imply the further condition that the cashier should regard all the provisions of law looking to the protection of the association from loss, or to the accomplishing its successful, safe, and profitable operation. Such provisions are found mainly in the Revised Statutes, or are at least so extensively embodied in them, and originated by them, that any attempt to read correctly a bond of the class in suit must lead at once, and directly, to their examination, and must find very largely, if not in the main, its support in their injunctions."

What, if any, contested question determinable by reference to the national banking act was raised in this case does not appear from the report. But there, as in the case at bar, the suit was one to enforce a contract whose foundation was an act of congress, and whose effect depended upon such act even though no contest over the meaning or application thereof might develop in the course of the litigation.

In Huff v. Union Nat. Bank, 173 Fed. 333, a suit by stockholders of a national bank to recover from its officers in its behalf moneys lost to it through excessive loans was held to present a jurisdictional federal question arising upon the face of the bill. Judge Van Fleet said:

"Obviously it seems to me that in such a case the suit must be held to be one arising under a law of the United States, because the right to recover, if it exists, is thus directly given by an act of congress, and the court is bound, therefore, in determining the controversy to decide whether or not the act gives the right claimed under it. Nor is this view to my mind at variance with the contention of the defendants, based upon the language of some of the cases, that it must appear from the averments of the bill that the construction of a federal statute is necessarily involved; for, in order to determine whether or not the act relied on does give the right claimed, the court is necessarily required to construe the act. That that question of construction is a matter in actual controversy sufficiently appears from a pleading which, like the present bill, merely alleges the violation of the statute, the fact of the injury resulting from such violation, and the fact that compensation has not been made for that injury. Such controversy exists because, if the complainants' construction of the law be correct, the defendants ought to have made good the loss resulting from their wrongful acts; and their failure to do so is in itself a denial of the correctness of that construction. * * * * The idea that the bill should allege that the defendants actually dispute the construction of the statute claimed by the complainants is not, so far as I have been able to discover, supported by any of the cases upon the subject. To the contrary, it is now firmly settled that the existence of a federal question must appear from the complainant's statement of his own case, and cannot be aided by any allegation as to what the defendant claims or contends in that regard".

It seems to us also that the statutory power to mortgage property needed for the perform-

ance of the public duties of a railway company, even when conferred by its charter, is a power quite distinct in nature from the power to be a corporation; and that those portions of the act conferring it are to be construed as independent legislation and not as parcel of the creative, incorporating law. Such statutory power necessarily includes both the corporate capacity and the legislative permission to make a conveyance otherwise against public policy. Therefore, such permission should not be deemed within the purview of an act like that of 1915.

SECOND POINT

The validity and effect of the various provisions of the mortgage must be determined with reference to the acts of 1873 and 1874, which are not acts of incorporation.

Argument

As above indicated, these acts are purely regulative in their character, dealing with the company as a corporation already existing, and upon their face appearing to be only supplementary to the previous acts. Full compliance with these regulations is essential to the complete validity of the bonds and mortgage. To determine whether there has been such compliance requires the interpretation of the acts and of the bonds and mortgage, and thus involves the solution of a federal question in no way dependent upon the fact that the company was incorporated under an act of congress. Surely congress did not intend to deprive the federal courts of their power to construe and enforce national laws regulating national corporations and enacted after their creation.

JURISDICTION BY REASON OF DIVERSITY OF CITIZENSHIP

Specifications of Error

1. The court erred in holding that it was without jurisdiction to hear and determine said cause, and in dismissing the amended bill of complaint therein because of such supposed want of jurisdiction.

4. The court erred in holding that it had not jurisdiction to hear and determine said cause as a suit of a civil nature, in equity, where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of three thousand dollars, and is between citizens of different states.

First Proposition

The court has jurisdiction of this cause on the ground of diversity of citizenship.

FIRST POINT

The diversity of citizenship is sufficiently shown by the record.

Argument

The amended bill, duly verified, alleges (Tr., 1-2, fol. 3) that the plaintiff is a corporation duly

organized and existing under and by virtue of the laws of the state of New York; that (Tr., 2, fol. 6) the defendant New Orleans Pacific Railway Company is a corporation duly organized and existing under and by virtue of the laws of the state of Louisiana; that (Tr., 2, fol. 5) the defendant The Texas and Pacific Railway Company is a corporation duly created by and existing under the laws of the United States of America, and has its principal place of business and its principal operating and general offices in the city of Dallas, in the state of Texas, in the Dallas division of the northern district of Texas, and that a material and substantial part of the railroads owned and operated by it, to wit, over 400 miles thereof, are located in said northern district of Texas, and that said defendant is a resident and inhabitant of said Dallas division of said northern district of Texas. It is further alleged (Tr., 12, fols. 43-44) that the said defendant now owns and operates approximately 1,039 miles of railroad in the state of Texas, approximately 779 miles of railroad in the state of Louisiana, and approximately 32 miles of railroad in the state of Arkansas.

The act of congress approved March 3, 1871, incorporating said defendant, The Texas and Pacific Railway Company, of which this court takes judicial notice, provides by section 1 thereof that said defendant is authorized and empowered to lay out, locate, construct, maintain, furnish and enjoy a continuous railroad and telegraph line from a point at or near Marshall, Texas, to ship's channel in the Bay of San Diego, California; and a supplementary act of congress of May 2, 1872, confers authority upon said defendant to construct, maintain, control and operate a road between Marshall, Texas, and Shreveport, Louis-

iana. The mortgage in suit, a copy of which is made a part of the bill, recites (Tr., 50) that the defendant is a corporation created by and existing under the laws of the United States of America and of the states of Louisiana and Texas.

If the contention of appellant, that these facts make said defendant a citizen of Texas for purposes of federal jurisdiction, is sound, the absence of a direct averment that it is a citizen of Texas is immaterial, since all the facts are alleged from which citizenship appears as the necessary legal intendment.

> Sun Printing & Publishing Assn. v. Edwards (1904), 194 U. S. 377; Marshall v. Baltimore & Ohio R. R. Co. (1853), 16 How. 314; Baltimore & O. S. W. R. Co. v. Davis (C. C. A. 7th Cir. 1906), 149 Fed. 191; Mathieson Alkali Works v. Mathieson (C. C. A. 4th Cir. 1906), 150 Fed. 241.

SECOND POINT

The facts above stated with reference to the defendant The Texas and Pacific Railway Company constitute it a citizen of Texas for purposes of jurisdiction of the federal courts in this cause.

Argument

The doctrine that for purposes of federal jurisdiction a state corporation is a citizen of the state which created it, had its inception in a case involving not a state, but a federal corporation. The status of a corporation for federal jurisdictional purposes was expounded by the Supreme Court for the first time in Bank of United States v. Deveaux et al. (1809), 5 Cranch 61. This was

a suit by the first Bank of the United States, a federal corporation, against citizens of the state of Georgia. The court held that a corporation could not, as such, be a citizen, but went behind the shell of the corporation and founded jurisdiction upon the ground that the controversy was between the corporators, citizens of the state of Pennsylvania, and the defendants, citizens of the state of Georgia. The same doctrine was applied to the case of a state corporation in Hope Insurance Co. v. Boardman (1809), 5 Cranch 57, which was argued and decided simultaneously with the Deveaux case.

Before the decision in the Deveaux case, the Supreme Court had held in the case of Strawbridge v. Curtiss, 3 Cranch 267, that where there are two or more joint plaintiffs and two or more joint defendants, each of the plaintiffs must be capable of suing each of the defendants in the courts of the United States in order to support jurisdiction. For almost half a century after the decision in the Deveaux case, the courts applied the doctrine in the Strawbridge case and the Deveaux case to suits in federal courts by or against corporations and insisted upon the requirement that all the corporators must be citizens of different states from all of the parties on the other side.

In Louisville, etc. R. R. Co. v. Letson (1844), 2 How. 497, the Supreme Court finally modified this doctrine and established the conclusive presumption of citizenship, which has never since been departed from. What the court decided in this case cannot be better expressed than in the language used by Chief Judge Taney, in Covington Drawbridge Co. v. Shepherd (1857), 20 How. 227 (233):

> "The question as to the jurisdiction of the courts of the United States in cases

where a corporation is a party, was argued and considered in this Court, for the first time, in the cases of the Hope Insurance Company v. Boardman, and of the Bank of the United States v. Deveaux, 5 Cr., 57 and 61. These two cases were argued at the same term, and were, as appears by the report, decided at the same time. And in the last-mentioned case, the Court held that in a suit by or against a corporation, in its corporate name, this Court might look beyond the mere legal being which the charter created, and regard it as a suit by or against the individual persons who composed the corporation; and an averment that they were citizens of a particular state (if such was the fact), would be sufficient to give jurisdiction to a court of the United States, although the suit was in the corporate name, and the individual corporators not named in the suit or the averment.

But in the case of the Louisville, Cincinnati, and Charleston Railroad Company v. Letson, the Court overruled so much of this opinion as authorized a corporation to plead in abatement, that one or more of the corporators, plaintiffs or defendants, were citizens of a different state from the one described, and held that the members of the corporate body must be presumed to be citizens of the state in which the corporation was domiciled, and that both parties were estopped from denying it. And that, inasmuch as the corporators were not parties to the suit in their individual characters, but merely as members and component parts of the body or legal entity which the charter created, the members who composed it ought to be presumed, so far as its contracts and liabilities are concerned, to reside where the domicil of the body was fixed by law, and where alone they could act as one person; and to the same extent, and for the same pur-

> poses, be also regarded as citizens of the state from which this legal being derived its existence, and its faculties and powers."

And to use the language of Mr. Justice Gray, in Shaw v. Quincy Mining Company (1891), 145 U. S. 444, at page 451,

> "And it has ever since been treated as settled that for these purposes the members of a corporate body must be conclusively presumed to be citizens of the state in which the corporation is domiciled."

It is to be noted that this doctrine originated at a time when corporate activities were usually confined to the limits of the state of creation, and rests upon the theory that the citizenship of a corporation is that of the state for which it is chartered to do business and in which it has its habitat and domicile. In such state it operates by virtue of the authority conferred by the charter and has its legal home.

It is apparent that there is nothing peculiar in the nature of the sovereign body creating the corporation which makes this doctrine inapplicable to the case of a federally chartered corporation. The Texas and Pacific Railway Company, for example, has been created by competent authority to transact railroad business in the state of Texas, and has its habitat and domicile in that state. It may, therefore, as properly be presumed to be a citizen of Texas as if it had been created by the laws of that state. It is true that by virtue of its incorporation under the laws of the United States it is a citizen of the United States, but there is no reason why a corporation should not have a dual citizenship as well as a natural person.

That the doctrine of citizenship for jurisdictional purposes is not as firmly established in case of federal corporations arises from the fact that there has been practically no occasion for the application of such doctrine. Practically all federal corporations, except such as were chartered to operate in the District of Columbia or in territories, in existence prior to 1875, were able to sue or to be sued in the federal courts by reason of an express grant of jurisdiction contained in their charters.

Since the judiciary act of 1875, and prior to the act of January 28, 1915, all federal corporations, with the exception of national banks since 1882, have been able to sue and to be sued in the federal courts on account of their federal origin. In the case of national banks, congress expressly provides that the federal courts shall have the same jurisdiction as in respect of banks organized under state laws.

The act of 1864, providing for the incorporation of national banks, did not contain any general provision equivalent to the express grant of jurisdiction in former national bank charters. It did provide that suit might be brought in the federal court *against* a bank organized under this act in the district in which the bank was established. In respect of suits instituted by such a bank against a citizen of a state other than the one in which the bank was located, the question whether the federal courts had jurisdiction on the ground of diversity of citizenship, was presented and passed upon by the circuit courts in a number of cases. In every one of these cases which we have been able to find the court reached the conclusion that the fiction of citizenship in

the case of a state corporation was equally applicable to federal corporations, and that national banks must be regarded for purposes of federal jurisdiction, as citizens of the respective states in which they were domiciled.

Thus in St. Louis National Bank v. Allen (Circ. Ct. D. Ia., 1881), 5 Fed. 551, which was a suit by a national bank organized under the act of 1864, and located in St. Louis, Mo., against a citizen of Iowa, the court held that for purposes of federal jurisdiction the bank must be regarded as a citizen of Missouri. After examining the basis and development of the rule that for purposes of federal jurisdiction a state corporation is a citizen of the state under whose laws it was incorporated, the court, McCrary, J., on page 553, reached the conclusion that the same rule should apply to federal corporations:

> "*It is clear that a corporation acquires no attribute of citizenship by being organized under, or created by, a state law that it would not possess if created by a law of the United States.* The difficulties in the way of permitting corporations to sue in the federal courts on the ground of citizenship, apply with the same force whether a corporation derives its existence from a state or national law. The difficulties have been overcome, with respect to state corporations, by adopting an arbitrary presumption as to citizenship of the stockholders—a presumption, no doubt, often contrary to the fact, but justified in the opinion of the supreme court, by considerations of great public importance. *These considerations apply alike to all corporations located and doing business within a state, whether chartered under state or federal authority.* The policy of the adjudications referred to is to treat corporations as citizens of the

> state in which they are located; the circumstance that they derive their existence from a state law makes no difference. If they are created by an act of congress, and located within a state, they become, within the reason of the rule, citizens of the state as much as state corporations."

In Manufacturers National Bank v. Baack (Cir. Ct. S. D. N. Y. 1871), 16 Fed. Cas. 671, 8 Blatchf. 137, Judge Blatchford, in an exhaustive opinion, reached the same conclusion. After stating the rule as to state corporations, he said, 16 Fed. Cas. p. 672:

> "This rule, however, does not *ex vi termini* cover the case of a corporation created by an act of congress.
>
> "The argument urged against jurisdiction in this case, drawn from citizenship, is that, as the corporation is created by the United States, the only legal presumption that can be drawn is that its members are citizens of the United States; and that there is no presumption that they are citizens of the state in which the corporation is located. * * *
>
> "The members of a corporation created by the United States, and located in a particular state, in the manner and to the extent in which national banking associations are located in particular states, may as properly be presumed to be citizens of the United States and residents in the state where the corporation is located, so as thereby to be citizens of such state, as the members of corporations created by a state may be presumed to be citizens of the United States, and residents in the state creating it, and in which it is located, and, therefore, citizens of such state."

In Orange Nat. Bank v. Traver (Cir. Ct. D. Ore. 1881), 7 Fed. 146 (148), the court said:

> "It has been finally settled that a suit in a national court by or against a corporation, for the purpose of jurisdiction is to be conclusively presumed to be a suit by or against citizens of the state under whose laws such corporation was formed; and therefore it is deemed a citizen of the state which created it. O. & M. Ry. Co. v. Wheeler, 1 Black 295; Cowes v. Mercer Co., 7 Wall. 121. Strictly speaking, the plaintiff is a citizen of the United States but not of any state. Still, the plaintiff, although organized under a law of the United States, is by such organization and law located in the state of Massachusetts, and *by a parity of reasoning its stockholders may be presumed to be citizens of said state, and the corporation be entitled to sue and be sued as a citizen of Massachusetts.*"

National Park Bank v. Nichols (Cir. Ct. N. D. Ill. 1869), 2 Biss. 146, 17 Fed. Cas. 1,224; Main v. Second Nat. Bank (Dist. Ct. W. D. Wis. 1874), 6 Biss. 26, 16 Fed. Cas. 509.

Of course, the contention that a federal railroad corporation is a citizen of any state has rarely been raised because jurisdiction in suits by or against such a corporation could, from 1875 to January 28, 1915, always be predicated on the ground of federal incorporation. It is a matter of common knowledge, however, that in a large number of suits against the Union Pacific and Northern Pacific Railroads jurisdiction was actually invoked and taken upon the ground of diversity of citizenship.

Thus in Union Pacific Railway Company v. Harris (1895), 158 U. S. 326, which was a suit by a citizen of Colorado in the circuit court of Colorado against the Union Pacific Railway Company

for personal injuries, the complaint alleged that the defendant "is duly chartered and organized under and by virtue of the laws of the United States, and having its principal place of business in the city of Omaha and state of Nebraska, and is now and was at the time and times hereinafter stated, a citizen of the state of Nebraska." Judgment was recovered against the defendant and affirmed by the circuit court of appeals. Defendant sued out a writ of error to the Supreme Court. The case came up on a motion to dismiss or affirm under subdivision 5 of rule 6. The contention of the defendant in error in making the motion to dismiss was, that the Supreme Court had no jurisdiction because jurisdiction below depended entirely upon diversity of citizenship, and therefore the decision of the circuit court of appeals was final. The motion to affirm was made upon the theory that there was at least color of ground for dismissal, and that therefore affirmance should follow if it be manifest that the writ was taken for delay only. Plaintiff in error, in resistance to the motion to dismiss, urged that jurisdiction was not dependent entirely upon the opposite parties being citizens of different states but rested in addition on the fact that the defendant was a federal corporation, and in opposition to the motion to affirm, stated that there was no color of ground for dismissal since the allegation of diverse citizenship was frivolous and utterly insignificant. The Court held that since the defendant was a federal corporation, jurisdiction was not based entirely upon diversity of citizenship, and therefore the motion to dismiss should be denied, but held further that there was color for the motion to dismiss and entertained the motion to

affirm and affirmed the judgment below. On page 327 the Court, Chief Justice Fuller speaking, said:

> "In the present case, jurisdiction was invoked on the ground of diverse citizenship, and it is said that that was the sole ground, and that the reference to the authority under which the corporation was chartered and organized was merely incidental, and, further, that as the case did not involve the validity or construction of the charter of plaintiff in error, no federal question arose. It is not for us to inquire why writs of error to circuit courts of appeals in actions for damages for negligence of railroad corporations should be allowed simply because the corporations are chartered under the laws of the United States, in a statute whose object was to relieve an overburdened court, since such is the effect of the statute according to its plain language. Nevertheless, as plaintiff below appears to have really proceeded on the ground of diverse citizenship, *we think there was color for the motion to dismiss although, as the other fact upon which jurisdiction could be predicated existed, we are obliged to overrule it.*"

It seems clear that the supreme court recognized diversity of citizenship as one ground of jurisdiction in this case. The fact that the defendant was a federally chartered corporation appeared on the face of the record. If, therefore, the Supreme Court had considered frivolous or unsound the allegation that defendant was a citizen of Nebraska, there would have been no color of right to a dismissal, because clearly in that case jurisdiction not only would *not* have been dependent entirely upon diversity of citizenship, but

would have been dependent *entirely* upon the fact of federal incorporation.

See also Northern Pacific Railroad Company v. Amato (1892), 144 U. S. 465.

It is true that the defendant was chartered to construct and operate a railroad from Marshall, Texas, to the Pacific Ocean, and that the completion of its entire route would have brought it into the present states of New Mexico, Arizona and California as well as Texas. The defendant has, however, elected not to construct the portion of its charter route extending through these other states, and its land grants in such states to aid in the construction of its road have been forfeited by act of congress of February 28, 1885 (23 Stat. at L. 337). The defendant has also acquired and now operates a large mileage in Louisiana and a few miles of road in Arkansas. While the defendant might under the authority of its charter, be conducting railroad business in New Mexico, Arizona and California as well as in Texas it has elected not to do so and has actually made its residence and domicile in Texas. It seems clear that if for purposes of federal jurisdiction the defendant is to be considered a citizen of any state, it should be regarded as a citizen of Texas, because it is a resident and inhabitant of that state and has the main part of its mileage and its principal and general offices there, and also because that is the state in which the part of its original charter route which the defendant elected to construct is located. Its railroad business in Louisiana (except the short spur to Shreveport) and in Arkansas is conducted without express authority of its charter and by the consent and authorization of these states and it cannot be said to have its legal home in

these states. Even if, however, the fact that the defendant was originally chartered to conduct a railroad business in the states of New Mexico, Arizona and California as well as in Texas should lead to the conclusion that it was constructively located and domiciled in those states in addition to Texas, and that by reason of such location and domicile it is a citizen of such states as well as of Texas, the defendant would merely occupy the same position for purposes of federal jurisdiction as a consolidated corporation of such states and for purposes of jurisdiction of the federal court in this case would be regarded as a citizen of Texas.

Ever since the case of Gassies v. Ballon (1832), 6 Peters 761, it has been established that, to use the language of Chief Justice Marshall, "a citizen of the United States, residing in any state of the Union, is a citizen of that state." This principle has been embodied in the first section of the Fourteenth Amendment, which provides:

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside."

In Railroad Co. v. Koontz (1881), 104 U. S. 5, the Court said:

> "A corporation may, for the purposes of suit, be said to be born where by law it is created and organized."

It seems clear that the defendant is a citizen of the United States by virtue of its incorporation under the laws of the United States. That it is a resident and inhabitant of the state of Texas was held by the Supreme Court in Matter of Dunn (1909), 212 U. S. 374. The plaintiff in that case asserted that the defendant The Texas and Pa-

cific Railway Company was an inhabitant of New York and therefore could not be sued in the northern district of Texas without its consent, and the defendant urged that its residence and domicile were in the northern district of Texas. On p. 388, the court, Peckham, J., said:

> "Upon the latter question the facts on deposition before the United States district judge in Texas showed that the company maintained an office in Dallas County, Texas, and that the senior vice-president lived in Dallas, and that for many years the company had designated Dallas as its general office, and that all the acts of the board of directors taken in New York City are subsequently affirmed by the meeting of the board at Dallas before they are considered effective. We are of opinion that the defendant company was liable to suit in the northern district."

After referring to the acts of congress dividing Texas into various judicial districts and to the statutes of Texas providing for service of process the court said:

> "Under these various statutes the plaintiffs would have had the right to sue the Texas and Pacific Railway Company in the northern district of Texas, because it was a resident of and doing business within that district, and had an agent there upon whom service could properly be made."

From the facts that it is a citizen of the United States and a resident of Texas, the conclusion follows that the defendant is a citizen of Texas for jurisdictional purposes in this cause.

Second Proposition

The act of January 28, 1915, does not deprive the federal courts of their jurisdiction of this case arising out of diversity of citizenship.

Argument

If the defendant no longer can sue in the federal courts on the other grounds hereinbefore discussed, it will be at a disadvantage as compared with state railroad corporations, unless it can sue and be sued in the federal courts on the ground of diversity of citizenship. This would be contrary to the spirit of the act of January 28, 1915, which, as shown by the reports of the house and senate judiciary committees, and the discussion thereof, was intended merely to place the defendant in the same position as such other railroad corporations. The following statement by Mr. Floyd, on behalf of the house judiciary committee, is directly in point:

> "This bill was introduced by the gentleman from Texas (Mr. Beall), and the Texas Pacific Road, operating in Texas, was incorporated by act of congress, and is the *only road in the state of Texas that has the right to transfer its cases to the federal court on the ground that it was incorporated by congress, thereby giving it an advantage over other railroad corporations operating in the state of Texas.*" 52 Congressional Record 283.

Congress was seeking, at the instigation of a representative from Texas, to prevent the defendant from doing what other railroad companies operating in Texas could not do, namely, remove suits brought against it in the state courts by

citizens of Texas to the Federal courts, and by preventing it from so removing, Congress intended to place the defendant in the same position as such other railroad companies.

Résumé

1

(1) By the act of March 3, 1871, the defendant company was expressly subjected to the original jurisdiction of the federal courts, but not to their jurisdiction by removal.

(a) Such is the literal significance of the language employed in the statute.

(b) To construe it otherwise is to render it without practical effect, and to treat it as superfluous, and so is contrary to elementary rules of interpretation.

(c) The construction for which we contend is in harmony with the requirements of the time and country, and with the purpose of congress to promote the building and successful operation of a railroad for public service in a troubled time and through a wild country, when and where local courts were likely not to be of the highest character.

(d) The construction for which we contend is supported by judicial authority as high as any that possibly could be adduced, short of the direct decision of this Court.

(2) The jurisdiction thus expressly conferred and imposed by the act of March 3, 1871, has not been taken away by the act of January 28, 1915.

(a) The language of congress in taking away federal jurisdiction of a railroad company's litigations resting "upon the ground that said railroad company was incorporated under an act of congress", was accurately descriptive of a ground of jurisdiction which as a matter of practical fact did exist, and was the same language which this court habitually used in speaking of the same thing.

(b) Such language signified the federal jurisdiction which existed solely because of the constructive federal question inherent in every suit by or against a federally chartered company. It was not intended by congress to include, and in its repeated use by this Court the expression never had included, jurisdiction arising from the existence of an actual federal dispute, from express grant, or from any of the numerous sources of federal jurisdiction.

(c) To construe the act of 1915 as repealing the express grant of jurisdiction contained in the act of 1871, is to hold that a general act which contains no repealing clause, and whose terms are not inconsistent with those of an earlier special act, and which makes no reference to such act, impliedly repeals the same. This is contrary to fundamental rules of interpretation.

(d) Congress may well have intended, without the slightest inconsistency and with perfect propriety, to take away the implied jurisdiction which originated in the decision of a doubtful question by a divided

Court, without disturbing the express jurisdiction which congress itself had directly conferred; to take away from federally chartered railway companies the power to remove to the federal courts the numerous suits, mostly for damages, brought in state courts by plaintiffs who preferred those tribunals, without depriving either the companies or their adversaries of the right to resort in the first instance to the federal courts if they chose to do so.

(e) The history of the passage of the act of 1915 through the house and senate shows that the evil which congress meant to cure was the removal from the state courts to the federal courts of causes that were without other basis of federal jurisdiction, "on the sole ground that the corporation was chartered by congress"; and it shows that congress did not intend to take away federal jurisdiction of a federally chartered railway company when it could "allege some other ground provided by statute for the transfer of cases from the state to federal courts".

(f) Congress doubtless had in mind the provisions of Section 28 of the judicial code, and chose skilfully the means of accomplishing its purpose, which the act of 1915 fully does if given the construction for which we contend.

2

(1) There is in this case such a federal question as gives rise to federal jurisdiction.

(a) The act of congress whereby the defendant company was incorporated and the acts supplementary thereto regulate in great detail the issue of bonds and mortgages by the company.

(b) A railroad company can mortgage its railroad property only as authorized by its charter and governing laws.

(c) A bill to foreclose a railroad mortgage must show such authority.

(d) Therefore the question whether and to what extent the various provisions of the mortgage are valid arises on the face of the bill.

(e) A question determinable by the interpretation and application of an act of congress is a federal question.

(f) It is not essential that the decision finally turn on the question that gives jurisdiction.

(g) But this case involves federal questions that are real subjects of dispute.

(2) The act of January 28, 1915, does not take away the federal jurisdiction arising out of the federal questions involved in this case.

(a) The jurisdiction taken away by the act of 1915 is only such as exists solely by reason of the constructive federal questions arising out of the mere fact of federal incorporation.

(b) Real questions growing out of the provisions of the charter are still jurisdictional, and there are such in this case.

(c) The act of 1915 has no possible bearing on such questions as arise out of the regulative acts of 1873 and 1874, which were not acts of incorporation.

3

(1) The federal courts have jurisdiction of this case by reason of diversity of citizenship.

(a) Diverse citizenship is sufficiently alleged.

(b) The plaintiff is a New York corporation. One of the defendants is a Louisiana corporation, and the other is a federal corporation domiciled in Texas.

(c) The federal corporation defendant was chartered to do business in Texas and three other states. It has no line in such other three states, but in Texas it has its principal place of business, and its principal operating and general offices, and the greater part of its railway line.

(d) There is no reason why the legal fiction that the members of a corporation are citizens of the state of its domicile should not apply to federal corporations.

(e) Such decisions as there are on the subject sustain the applicability of such fiction to federal corporations, and the attribution to them of citizenship in their states of domicile.

(f) Defendant is a citizen of the United States because incorporated under its laws and has been held by the Supreme Court to be a resident of Texas. It is therefore a

citizen of Texas for purposes of federal jurisdiction.

(2) Jurisdiction by reason of diversity of citizenship has not been taken away by the act of 1915.

In consideration of the premises, the appellant, Bankers Trust Company, as Trustee, prays that the order of the district court dismissing the bill for want of jurisdiction be reversed, and that the cause be remanded with instructions to said court to hear and determine the same.

MAURICE E. LOCKE,
WILLIAM W. GREEN,
Counsel for Appellant.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 889.

BANKERS TRUST COMPANY, AS TRUSTEE,
APPELLANT,

v.

THE TEXAS AND PACIFIC RAILWAY COMPANY AND
NEW ORLEANS PACIFIC RAILWAY COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION.

REPLY BRIEF FOR APPELLANT.

MAURICE E. LOCKE, *Dallas, Texas,*
WILLIAM W. GREEN, *New York City,*
Solicitors for Appellant.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915.

No. 889.

BANKERS TRUST COMPANY, AS TRUSTEE,

v.

THE TEXAS AND PACIFIC RAILWAY COMPANY ET AL.

REPLY BRIEF FOR APPELLANT.

Preliminary.

Two briefs have been filed in behalf of The Texas and Pacific Railway Company, one by its counsel and the other, styled an "additional brief," by counsel for a "protective committee of stockholders." We shall deal with both these briefs, arranging what we wish to say in sections headed by the numbers of the pages containing the matter to which response is made.

ARGUMENT.

Brief, Page 6.

It is not necessary to consider now whether the italicised quotation from Chief Justice Marshall's remarks in the Osborn case would state accurately the result of such a grant of jurisdiction as we claim exists in the act of March 3, 1871, since as to amount and situs of controversy this case clearly is one proper to be brought where it was brought. We do not see, however, why such a statute should be held to give federal jurisdiction over petty controversies regardless of other pertinent statutes, or why it should be held to authorize suit away from the venue otherwise established. Perhaps it was partly a reservation of this question which Mr. Justice Miller had in mind when, in Smith *v.* Union Pac. R. Co., 2 Dillon, 278 (our original brief, p. 11), he held that the same language now under interpretation made the Union Pacific Railroad Co. "capable of suing and being sued in the federal courts which have jurisdiction of the same class of actions between other parties." Certain it is that neither Mr. Justice Miller in the Smith and Bauman cases, nor Chief Justice Waite in Pacific Railroad Removal Cases, could have overlooked this remark in their careful examination of the Osborn case.

Brief, Pages 6, 7 and 10.

On each of these pages it is assumed as the major premise of the argument that the language of the jurisdictional clause in the act of March 3, 1871, is substantially the same as that of section 3 of the charter of the first Bank of the United States, which the court held did not confer jurisdiction. We submit that the two clauses are very different, and that the clause in the act of 1871 is more nearly like that in section 9 of the bank charter, which Chief Justice Marshall said did

confer federal jurisdiction. For easier comparison, we print the clauses in parallel columns.

Bank Charter.	Act of 1871.
Section 3.	
"To sue and be sued, plead and be impleaded, answer and be answered, defend and be defended, *in courts of record, or any other place whatsoever.*"	"To sue and be sued, plead and be impleaded, defend and be defended, *in all courts of law and equity within the United States.*"
Section 9.	
An action of debt may be brought *"in any court of record of the United States, or of either of them."*	

The language of section 3 of the bank charter means nothing more than to say that the bank can have its controversies heard in courts and whatsoever other tribunals (*e. g.*, nowadays, bank commissioners) may hear controversies. There is no mention of any particular tribunal or class of tribunals. But in section 9 courts of record "of the United States or of either of them" are given jurisdiction in language pronounced sufficient. These words seem to us no more definite and no more inclusive than those by which in the act of 1871 jurisdiction is given to "all courts of law and equity within the United States," save for the irrelevant difference between a court of record and a court of law and equity. The expression "all courts within the United States" includes precisely the same tribunals as the expression "all courts of the United States or of either of them." All courts within the United States are courts of the United States or of one of them; and all courts of the United States or of either of them are courts within the United States.

Brief, Page 8.

Of course we do not know just what Mr. Justice Miller had in mind when he said jurisdiction was given to "the federal courts which have jurisdiction of the same class of actions between other parties." It may have been what we have already suggested (*ante*, 2). Or it may have been the fact that the district courts were courts of bankruptcy and admiralty and the circuit courts were courts of general law and equity jurisdiction, and this court had original jurisdiction in cases involving ambassadors, ministers and consuls. Or it may have been both these matters. What he held was that the circuit court had jurisdiction of a personal injury action.

Brief, Page 9.

There is nothing that shows that any member of the court differed from Chief Justice Waite and Mr. Justice Miller in the interpretation which they placed upon the charters in Pacific Railroad Removal Cases. These were removal cases, and the charters did not confer jurisdiction by removal. Holding that jurisdiction by removal existed for other reasons, the majority had no occasion to say anything about this matter. Not being able to agree with this, the minority thought it proper to avoid misconception by stating just what their views were upon the whole question of federal jurisdiction over the defendant companies.

Brief, Page 11.

We see no reason for assuming that Congress might not wish to abate a nuisance by taking away one ground of jurisdiction which had been abused, without desiring to take away another ground which had not been abused, and the resort to which might promote the efficient and orderly administration of justice, as all concerned agree that it would do in this case.

Brief, Page 12.

Counsel say: "It is a fact, judicially known to this court, and uncontroverted, that the act of 1915 does not apply to any railway corporation except The Texas and Pacific Railway Company." The act of 1915 is general in its terms, and applicable to any railroad company incorporated under an act of Congress. The court knows judicially that several have been so incorporated. We do not see how it can know judicially that they all have been dissolved, or have become inactive. In fact, we are informed that at least three federally chartered railroad companies are still in existence. At any rate, Congress saw fit to enact a general law and not a special law, notwithstanding the fact that the evil which called it into action was the abuse by this one company of its privilege of removing damage suits from state courts to federal and then bringing them here, solely upon the accidentally existing ground, having no bearing upon the questions involved, that it has a charter from the United States (224 U. S., 582). Congress aimed intelligently at that evil, whether practiced by the defendant company or by some other, and struck it down. See pages 32 and 35-40 of our original brief.

Brief, Pages 19 to 24.

Our contention is that the act of 1915 was intended by Congress to do what its exponents in Congress said it was meant to accomplish—to prevent such a company as the defendant from taking its cases to the federal courts "on the sole ground that it is a corporation authorized by Congress," or "the sole ground that the corporation was chartered by Congress," and to require it to "allege some other ground provided by statute" (our original brief, p. 36). We think Congress meant just what this court seems to us to have meant by its repeated expressions quoted on pages 21 to 31 of our original brief. And those expressions we under-

stand this court to have applied to the numerous cases coming before it wherein the federal question constructively involved had "no bearing upon the questions raised and federal jurisdiction was maintained "solely because plaintiff in error is incorporated under an act of Congress" (our original brief, pp. 27-31.)

To illustrate: In a personal injury action there is constructively involved the federal question whether the defendant is a corporation with power to operate a railroad, and none other. But this question, though always constructively present, is never present in fact, and if actually raised it probably would be pronounced frivolous. The situation is like that in the numerous land and mining claim cases cited by the appellees, wherein the court has said that a real federal question must be the foundation for federal jurisdiction. Compliance with the land laws or mining claim laws of Congress is theoretically or constructively the first link in the chain of title. But in fact titles are treated as starting with the patent, and only in the rare litigations which go behind the patent is there a real federal question. In the personal injury action it seems entirely correct to say that federal jurisdiction depends upon the mere fact of federal incorporation. But the inquiry whether bonds and a mortgage in suit comply with the detailed prescriptions of four relevant acts of Congress is a quite different matter. It presents a real federal question which must be determined, even though not debated and even though the corporation issuing the papers be not before the court, both of which facts existed in Male *v.* Atchison, T. & S. F. Ry. Co., 240 U. S., 97. On pages 42-45 of our original brief we have tried to show that some phases of this question are likely to be the subjects of actual contest in the present case. This issue arises independently of the fact that the company was chartered by act of Congress. It is an accidental and collateral circumstance, and not of the essence of the thing, if the prescriptions are found in the charter, as some of them in this case are.

Counsel for the appellee claim that the act of 1915 was intended to repeal the doctrine of the Osborn case, in so far as railroads are concerned. We think not. The decision of the Osborn case was that it was within the power of Congress to subject by express enactment a federally incorporated company to the jurisdiction of the federal courts; nothing more. We do not see in the act itself, in the proceedings of Congress, or in the antecedent conditions, any indication that Congress intended to disturb this ruling. Indeed it could not have done so if it would. But Congress did intend, we think, wholly and solely to repeal the doctrine of the Pacific Railroad Removal Cases, that federally chartered railroad companies were entitled *as such* to remove to the federal courts cases brought against them in the state courts, and the concomitant doctrine that the federal courts had original jurisdiction of such suits. Federal incorporation was the only jurisdictional fact involved in any of these seven cases, and the sufficiency of that single fact was the matter, and the only matter, therein determined.

Brief, Page 20.

Additional Brief, Page 5.

Much stress is laid upon the fact that federal jurisdiction over any suit "by or against" any railroad company upon the ground that it has a federal charter is denied. We see nothing significant in this phrase. The act of March 3, 1875, and the various amendments thereof to and including sections 24 and 28 of the judicial code of 1911, had given federal jurisdiction, original and by removal, of cases arising under the laws of the United States; and it had been conclusively determined by this court that all suits by or against federally chartered companies were suits arising under the laws of the United States. Moreover, under the act of March 3, 1891, and under section 128 of the judicial code, in such cases the jurisdiction of the circuit courts of appeals was

not final, but the cases could be brought here. There was no objection to the statutes in their general application; but in the application of the statutes and the rule established by Pacific Railroad Removal Cases to the litigations of federal corporations two great evils had manifested themselves, (1) the constant removal of cases for whose removability there was no good reason, and (2) the constant bringing to this Court of cases for whose exceptional right of resort to this Court there was no good reason (our original brief, p. 32). Congress wished to cure these two evils without disturbing the general system. It could and did accomplish this purpose by enacting, as we think, that no federal court should have jurisdiction of any suit by or against any railroad company solely upon the ground that it had a federal charter. To have done less would have lessened the evils, but would not have removed them.

Brief, Pages 23 to 25.

The distinction between real federal questions and constructive federal questions may be illustrated further by the cases which counsel for the appellee puts on pages 23-24. The first is a personal injury case, wherein the federal question would be purely constructive, because from the face of the complaint it must appear that no substantial federal question did or could arise. The action to recover the contract price for 50,000 cross-ties and that to recover the agreed price for constructing ten miles of railroad might or might not involve real federal questions. If from the complaint it appeared that the cross-ties were bought for the maintenance of existing lines or the construction of track which the company had the clear right to construct, and that the ten miles of new track were sidings for its main line in Texas, the only federal question would be whether the company was a corporation with authority to maintain a railroad, a question which at this time is frivolous, a question which is not in fact a question, and which exists only con-

structively. But if the complaint indicated that the crossties were bought for resale, the federal question would be of very different character. And so it is with the third case, which is intended to represent the one at bar. Suppose the federal charter or some other controlling act of Congress limits the amount which the company may borrow, or the rate of interest it may pay, or the purposes for which it may mortgage its property, or the term for which it may defer repayment, or the remedies it may give to the mortgagees, is it not evident that in any suit to enforce the company's bonds and mortgage these statutory limitations are real factors in the litigation?

Brief, Page 28.

As above indicated, we admit the correctness of the decision in the Osborn case, and rely upon it, and consider its doctrine wholly without the scope of the act of 1915. We do not dispute the correctness of the decision in the Pacific Railroad Removal Cases; but we think the doctrine of those cases and its necessary concomitant constitute precisely the rule of law which Congress could and did abrogate by the act of 1915.

Brief, Pages 29 to 30.

The national bank cases cited on pages 48-51 of our original brief seem to us pertinent to the discussion in this. However different from the act of 1915 in other particulars, the acts of July 12, 1882, and March 3, 1887, are like it in taking away from the federal courts jurisdiction over the corporations affected, based upon the fact that they were incorporated under an act of Congress, and beginning with the Cooper case this court has repeatedly so held (120 U. S., 778; 142 U. S., 644; 191 U. S., 119; 238 U. S., 107; our original brief, pp. 22-24 and 25-27). And yet it was held in all the cases cited that the federal courts had jurisdiction

of controversies involving (in the Windsor Bank case *sub silentio* and very remotely) the interpretation and application of the national banking act, under which all national banks are incorporated. It follows that a federal question growing out of a federal charter may still be jurisdictional after the mere existence of such federal charter has ceased to be so.

Brief, Page 30.

We still think that, as bearing upon the application of a statute taking away jurisdiction based upon the ground that a company was incorporated under act of Congress, there is merit in the distinction (our original brief, p. 52) between the act by which it was incorporated and later acts dealing with it as an existing corporation and regulating its actions as such. The acts of 1873 and 1874 were of this character.

Brief, Pages 35 to 38.

Additional Brief, Pages 6 and 7.

Appellee urges, first, that diversity of citizenship is not sufficiently alleged; second, that the appellee is not a citizen of any state for purposes of federal jurisdiction; third, that, if it should be regarded as a citizen of any state, it is not a citizen of Texas, but a citizen of New York.

We did not intend to devote much space to arguing the sufficiency of the allegations of the bill, but since the appellee appears to urge this question seriously, we feel called upon to reply.

The direct allegation that a corporation is a citizen of a certain state is merely a conclusion and is in itself of no value. It is necessary only to allege the facts from which such citizenship can be deduced. Appellee cites several cases in which this court has said that it is not sufficient that juris-

diction may be inferred *argumentatively* from the pleading. We understand that this statement does not mean that if all the essential facts which by legal intendment show citizenship are clearly and positively alleged the pleading is insufficient. In fact this court, in the very cases relied upon by the appellee, has said:

> "In the last case it is said that 'where jurisdiction depends upon the citizenship of the parties, such citizenship, *or the facts which in legal intendment constitute it*, should be distinctly and positively averred in the pleadings or they should appear affirmatively and with equal distinctness in the other parts of the record'" (Italics ours). Grace *vs.* American Central Insurance Co., 109 U. S., 278, at pp. 283-284.

and also:

> "We are not required to say that it is essential to the maintenance of the jurisdiction of the circuit court of such a suit that the pleadings should refer, *in words*, to the particular clause of the Constitution relied on to sustain the claim of immunity in question, *but only that the essential facts averred must show*, not by inference or argumentatively, but clearly and distinctly, that the suit is one of which the circuit court is entitled to take cognizance" (Italics ours). Hanford *vs.* Davies, 163 U. S., 273, at p. 280.

What we understand the word "argumentatively" to mean in this connection is that it is not enough for the pleadings or the record to show some but not all of the essential facts constituting citizenship, because in that case the court must jump to conclusions by inference in order to supply the missing facts, and the Grace case relied upon by the appellee is a good illustration of the correctness of our interpretation. There was no evidence that any of the plaintiffs in that case were citizens of the United States, and in respect to one of them there was no evidence or allegation that he was a resident of any state. We need only cite to this court its comparatively recent decision in *Sun Printing and Publishing*

Association vs. Edwards, 194 U. S., 377, where neither the citizenship of the plaintiff nor that of the defendant was alleged in so many words, and where this court looked at the entire record and culled therefrom the various facts which, as a matter of law, showed the citizenship of the parties.

Appellee also urges that "a person may be a citizen of the United States and not a citizen of any particular State" (Brief, p. 38). We admit this. But it was held as early as 1832 by Chief Justice Marshall, in *Gassies vs. Ballou*, 6 Pet., 761, that an averment that the defendant had caused himself to be naturalized an American citizen and was residing in Louisiana was equivalent to a direct averment of citizenship and was sufficient for purposes of federal jurisdiction. The doctrine of this case has been reaffirmed in the two later cases, *Clausen vs. American Ice Co.*, 144 Fed., 723, and *Littell vs. Erie R. Co.*, 105 Fed., 539. In the latter case the court said, referring to the allegation that the plaintiff was a citizen of the United States and a resident of New Jersey:

> "This allegation is therefore, a full equivalent of what a direct one would be that the plaintiff is a citizen of New Jersey."

The bill alleges that the appellee was incorporated under the laws of the United States, which is an allegation that it is a citizen of the United States. The fact that it is a citizen of the United States is admitted by the additional brief for the appellee (p. 10). The appellee is also alleged to be a resident and inhabitant of the Northern District of Texas. In addition to these allegations all the facts upon which the legal validity of appellant's claim that the appellee is a citizen of Texas depends are sufficiently alleged or judicially noticed. The facts as stated must be assumed to exist as stated, for we are considering a motion to dismiss for reasons appearing upon the bill, not for reasons set up in a plea and duly proven, and particularly not for reasons apparent only in the brief of counsel. These facts may be epitomized as

follows: (1) The company was created by act of Congress. (2) It was created for the purpose of building and operating a line of railroad from a point in Texas, through Texas, New Mexico, Arizona and California, to a point in California. (3) It has its principal place of business and its principal operating and general offices at Dallas, in Texas, and is there resident and inhabitant. (4) Of its line of railroad, 1039 miles are in Texas, 779 in Louisiana, and 32 in Arkansas. (5) The lands granted to it by Congress along its to-be-adopted line in New Mexico, Arizona and California, as an aid in the construction of its line, were declared forfeited and restored to the public domain in 1885; see 23 Stat. at L., 337. (6) The only act which its charter provided should be done in New York was the causing of subscription books to be opened and the publishing of certain relevant notices there and in New Orleans and Washington. Our contention is that these allegations show Texas citizenship and negative New York citizenship.

We invite the attention of the court to *Manufacturers National Bank vs. Baack*, 16 Fed. Cas., p. 671, where Judge Blatchford, in an exhaustive opinion considering this very question of the sufficiency of the allegation in respect of the citizenship of a federal corporation, brushed aside the direct allegation that the plaintiff corporation was a citizen of Illinois and looked at the facts averred in the bill with regard to the status of the corporation, and based his decision upon the facts so alleged.

Brief, Pages 38 to 45.
Additional Brief, Pages 7 to 11.

But appellee urges that it is not a citizen of any state for purposes of federal jurisdiction. It dismisses lightly the six or seven decisions in respect of the citizenship of national banks, the only cases where this question has ever been squarely passed upon, saying that it does not "concede the correctness of the decisions cited nor accept them as final authority," and endeavors to distinguish these cases. We sub-

mit that these cases (our brief, pp. 60-62) are directly in point, and that an application of the principles there laid down leads inevitably to the conclusion that the appellee is a citizen of Texas. Appellee's counsel ignore the case of *Union Pacific Ry. Co. vs. Harris*, 158 U. S., 326 (our brief, pp. 62-65), where this court intimated in respect of the Union Pacific that jurisdictional diversity of citizenship existed.

Appellee contends that prior to the act of 1915 federal jurisdiction over suits by or against federal railroad corporations did not exist on the ground of diverse citizenship, but rested exclusively on the proposition that such suits arose under the Constitution or laws of the United States. It is urged on page 9 of appellee's additional brief that "The truth of the first" (the foregoing) "proposition was declared by this Court in that portion of the opinion in the Pacific Removal cases (*supra*), where the decision of this Court in the Osborn case is analyzed." Appellee states this portion of the Court's decision as follows (p. 9, additional brief):

> "In classifying the cases—four in number and one embracing controversies between citizens of different States—to which the judicial power of the United States is confined by the Constitution, this court pointed out that suits by or against the United States Bank could not possibly belong to any of these classes except the one which included cases arising under the Constitution and laws of the United States."

Appellee's counsel, however, in their statement of this court's opinion, omit the significant words "*as such.*" What Mr. Justice Bradley did say (115 U. S., 12) was:

> "Now, suits by or against the United States Bank could not possibly, *as such*, belong to any of these classes, except the first, namely, cases in law and equity arising under the Constitution, laws or treaties of the United States" (Italics ours).

What Mr. Justice Bradley was explaining was that, in the Osborn case, in which was examined the constitutionality of

the charter grant conferring jurisdiction over *all* suits by or against the United States Bank, it was held that such constitutionality must be measured by the four classes of cases to which the Constitution confined the judicial power of the United States. In speaking of these four classes, he said that suits by or against the bank could not *as such* belong to any class, except the first. This means merely that a suit by or against the bank might or might not belong to any one of his last three enumerated classes, but that one could not say that any and all suits by or against the bank must necessarily belong to any class except the first. For example, if an ambassador sued the United States Bank, such a suit would fall within the second class enumerated, namely, cases affecting ambassadors, other public ministers and consuls. Again, if the United States Bank should file a libel in admiralty, such a suit would fall within the third class enumerated, namely, cases of admiralty and maritime jurisdiction. The mere statement of these propositions exposes the fallacy of appellee's contention that Mr. Justice Bradley meant to say that *no* suit by or against the United States Bank could be entertained in the federal courts on the ground of diversity of citizenship.

The case of *Scott vs. Choctaw, Oklahoma & Gulf R. R. Co.*, 112 Fed., 180, cited at page 45 of appellee's brief, was a case where the federal corporation in question had its principal office and was a resident and inhabitant of Indian Territory. See *Wolff vs. Choctaw, Oklahoma & Gulf R. R. Co.* (1904), 133 Fed., 601, where the court held that this corporation could not be sued in a district court in Arkansas, inasmuch as it was not a resident and inhabitant of that state, but of Indian Territory. Of course the suit was not and could not be between citizens of different states, but between a citizen of a state and a citizen of a territory, and the statement of the district judge, quoted in appellee's brief, must be assumed to have been made with this fact in mind.

We invite attention to the Smith and Bauman cases, *supra,* decided by Mr. Justice Miller (our brief, pp. 11, 12). Speaking of the Union Pacific he said in the latter case:

> "I have heretofore held that it was suable in this court *by a citizen of another State*—Smith *vs.* Union Pacific R. Co.—and I am of opinion on consideration of the provisions of the charter, that it may sue and be sued in this district, *without reference to the citizenship of the adverse party*" (Italics ours). Bauman *vs.* Union Pacific R. Co., 3 Dillon, 367.

There remains to be considered appellee's contention that, if for jurisdictional purposes it is a citizen of any state, it is a citizen of New York.

As to the statement of facts appearing on page 7 of appellee's additional brief, we wish to say merely that it is not founded on the record, is by no means admitted to be correct, and we are sure will receive no attention from the Court. The question of the location of the principal office and domicile of the appellee was exhaustively considered in *Matter of Dunn,* 212 U. S., 374. Evidence with regard to the facts bearing upon the question of domicile was adduced before Judge Meek in that case and is in the record of that case filed in this Court. After a careful consideration of the facts, Judge Meek held that the appellee was a resident and inhabitant of the Northern District of Texas and liable to suit in that district without its consent. Upon a petition for a writ of mandamus, this court sustained the decision of Judge Meek. It was urged before this Court by counsel for the plaintiff (we are quoting from his brief):

> "The Texas & Pacific Railway Company is an inhabitant of the Southern District of New York and not of the Northern District of Texas."

And all the facts bearing on this question were before this Court in that case. This Court decided, Mr. Justice Peckham delivering the opinion, that the appellee here was a resi-

dent of the Northern District of Texas and was liable to suit therein without its consent under the federal statutes, which provide that suit must be brought in the district of which the defendant is a resident and inhabitant.

Appellee's chief reliance on this point is in the case of the *Texas & Pacific Railway Company vs. Interstate Commerce Commission,* 57 Fed., 948, affirmed 162 U. S., 204. In this case the lower court held on petition and answer and without evidence on the point of location of principal office that for the purposes of a statute which gave the Interstate Commerce Commission power to sue either in the district where the alleged violation of law was committed or where the defendant had its principal office, the appellee had its principal office in the Southern District of New York and that suit was properly maintained there under the statute. We submit that all that is meant by the decision in this case is that the appellee had a principal office in New York within the meaning of this statute, which has received a liberal construction in order to facilitate the work of the Interstate Commerce Commission. In both the cases last mentioned, as well as in that of Texas & Pacific Ry. Co. *vs.* Bigger, 239 U. S., 330, the company claimed, and in the Dunn case proved, that its domicile was in Dallas. But here we have to do with an undisputed allegation that its principal place of business and its principal operating and general offices are in Dallas, and no question of fact is involved.

Referring to the Dunn case, appellee states that "no complaint is made of that decision," but says that the question whether the appellee is a citizen of Texas was not involved and was not considered in that case. Plaintiffs in that action in their brief, point IV, subdivision 1, argued that the appellee here was a citizen of the state of New York. It cannot be doubted that this Court would not have held that the appellee was a resident and inhabitant of Texas if it had looked with favor upon this contention of the plaintiff in that case. It seems to us that the questions

of residence and citizenship of a corporation are so interwoven and so governed by the same principles that the decision by this Court in the Dunn case is in effect a decision that the appellee is a citizen of Texas for purposes of federal jurisdiction.

Additional Brief, Pages 10 and 11.

We do not doubt the sincerity of the suggestion of counsel for the protective committee of stockholders that they prefer that this suit be tried in the federal courts. So must every reasonable person. The federal courts alone are equipped for such matters, and they are especially so since the enactment of the judicial code of 1911. It would indeed be unfortunate if this Court should find itself compelled to hold that the act of 1915 had swept away every possible ground of federal jurisdiction over such a case. But we do not believe that Congress has done this. We believe it has cured the evils at which its act was directed, and at the same time has left open the entrance to the federal courts for cases like this, which unquestionably belong there.

Respectfully submitted,

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